the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the beforementioned parties, in such shares as the jury, by the verdict, shall find and direct.

III. *Provided always*, and be it enacted, that not more than one action shall be for, and in respect of, the same subject matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person.

IV. *And be it enacted*, that in every such action, the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant, or his attorney, a full particular of the person, or persons, for whom, and on whose behalf, such action shall be brought, and of the nature of the claim, in respect of which damages shall be sought to be recovered.

V. *And be it enacted*, that the following words and expressions are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context, or by the nature of the subject matter; that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons, or things, and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender; and the word "person" shall apply to bodies politic and corporate; and the word "parent" shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word "child" shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter.

VI. *And be it enacted*, that this Act shall come into operation, from and immediately after the passing thereof, and that [repealed, Stat. Law Rev. Act, 1875] * * * * nothing herein contained shall apply to that part of the United Kingdom, called Scotland.

VII. [Repealed, Stat. Law Rev. Act, 1875].

U. S. Circuit Court, N. Dist. California.

MATTER OF DAVID NEAGLE.

Upon a writ of *habeas corpus*, the United States Courts have jurisdiction to discharge the petitioner, when found to be in custody for an act done, or omitted, in pursuance of a law of the United States, no matter from whom, or under what authority, the process may have issued under which he is held.

The circumstances of a homicide, committed by an officer of the United States, will be inquired into by the United States Courts, to determine whether the act was committed in the line of his duty, or was malicious, wanton, or reckless, and without any reasonable apparent necessity. The Court does not make the inquiry at all, to decide whether a State statute has been violated, or whether the homicide has been committed upon land within the exclusive jurisdiction of the United States.

In matters of the public peace, in which the Government of the United States is concerned, the Marshals and Deputy Marshals, within the scope of their authority, are National peace officers, with all the statutory and common law powers appertaining to peace officers.

An assault upon, or an assassination of a Judge of an United States Court, whilst traveling for the purpose of holding Court, is a breach of the peace, affecting the authority and interests of the United States, and within the jurisdiction and power of the Marshal, or his deputies, to prevent, as peace officers of the Government of the United States.

This was an application for the discharge of David Neagle, a Deputy United States Marshal.

The facts of the case may be divided into two stages; the first as follows—

On the third of September, 1888, certain cases were pending in this Court, between *Frederick W. Sharon*, as executor, against *David S. Terry* and *Sarah Althea Terry*, his wife, and between *Francis G. Newlands*, as trustee, and others, against the same parties, on demurrers to bills to revive, and carry into execution, the final decree of the Court, in the suit of *William Sharon* against *Sarah Althea Hill*, and were decided on that day. That suit was brought to have an alleged marriage contract between the parties adjudged to be a forgery, and obtain its surrender and cancelation. The decree rendered adjudged the alleged marriage contract to be a forgery, and ordered it to be surrendered and canceled. The decree was rendered after the death of William Sharon, and was therefore entered as of the day when the case was submitted to the Court. By reason of the death of Sharon, it was necessary, in order to execute the decree, that the suit should be revived. Two bills were filed, one by the executor of the estate of Sharon, and the other, a bill of revivor and supplemental by Newlands, as trustee, for that purpose.

In deciding the cases, the Court gave an elaborate opinion upon the questions involved, and whilst it was being read, certain disorderly proceedings took place, for which the defendants, David S. Terry and his wife, were adjudged guilty of contempt and ordered to be imprisoned. See *In re Terry*, 36 Fed. Repr. 419.

The second stage of the case began upon the release of Terry and his wife, who made various threats of personal violence to Justice FIELD and the Circuit Judge. These threats were that they would take the lives of both Judges; those against Justice FIELD were sometimes, that they would take his life directly; at other times, that they would subject him to great personal indignities and humiliations, and if he resented it, they would kill him.

These threats were not made in ambiguous terms, but openly and repeatedly, not to one person, but to many persons, until they became the subject of conversation throughout the State and of notice in the public journals. Reports of these threats, through the press, and through reports of the United States Marshal and United States Attorney, reached Washington, and in consequence of them, the Attorney-General thought proper to give instructions to the Marshal of the United States for the Northern District of California, to take proper measures to protect the persons of the Judges from violence at the hands of Terry and his wife. On the return

of Justice FIELD from Washington, to attend his circuit, in June last, the probability of an attack by Terry upon him, was the subject of conversation throughout the State, and of notices in some of the journals in the City of San Francisco. It was the general expectation that if Terry met Justice FIELD, violence would be attempted upon the latter.

In consequence of this general belief and expectation, and the fact that the Attorney-General of the United States had given instructions to the Marshal to see that the persons of Justice FIELD and of the Circuit Judge, should be protected from violence, the Marshal of the Northern District appointed the petitioner in this case, David Neagle, to accompany Mr. Justice FIELD whilst engaged in the performance of his duties and whilst passing from one district to another within his circuit, so as to guard him against the threatened attacks. He was specially commissioned as a deputy by Mr. Franks, whose instructions to him were that he should protect Justice FIELD at all hazards, and knowing the violent and desperate character of Terry, that he should be active and alert, and be fully prepared for any emergency, but not to be rash; and in case any violence was attempted from any one, to call upon the assailant to stop, and to inform him that he was an officer of the United States.

Terry was a man of great size and strength, who had the reputation of being always armed with a bowie-knife, in the use of which he was specially skilled, and of showing great readiness to draw and use it upon persons towards whom he entertained any enmity or had any grievance, real or fancied.

On the 8th of August, 1889, Justice FIELD left San Francisco for Los Angeles, in order to hear a *habeas corpus* case which was returnable before him at that city on the 10th of August, and also to be present at the opening of the Court on the 12th. He was accompanied by Deputy Marshal Neagle, the petitioner. Justice FIELD heard the *habeas corpus* case on the 10th of August. On the 12th of August he opened the Circuit Court, Judge Ross sitting with him, and he delivered on the latter day an opinion in an important land case, and also an opinion in the *habeas corpus* case. On the following day the Court heard an application for an injunction in an important water case from San Diego County. No other cases being ready for hearing before the Circuit Court, he took the train on Tuesday, the 13th, at 1:30 o'clock in the afternoon, for San Francisco, where he was expected to hear a case then awaiting his arrival, immediately upon his return, being accompanied on his return by Deputy Marshal Neagle. On the morning of the 14th, between the hours of seven and eight, the train arrived at Lathrop, in San Joaquin County, which is in the Northern District of California, a station at which the train stopped for breakfast. Justice FIELD and the Deputy Marshal at once

entered the dining-room, there to take their breakfast, and took their seats at the third table in the middle row of tables. Justice FIELD seated himself at the extreme end, on the side looking toward the door. The Deputy Marshal took the next seat on the left of the Justice. What subsequently occurred is thus stated in the testimony of Justice FIELD—

"A few minutes afterward, Judge Terry and his wife came in. When Mrs. Terry saw me, which she did directly she got diagonally opposite me, she wheeled around suddenly and went out in great haste. I afterwards understood, as you heard here, that she went for her satchel. Judge Terry walked past, opposite to me, and took his seat at the second table below. The only remark I made to Mr. Neagle was, 'There is Judge Terry and his wife.' He remarked, 'I see him.' Not another word was said. I commenced eating my breakfast. I saw Judge Terry take his seat. In a moment or two afterwards I looked round and saw Judge Terry rise from his seat. I supposed at the time he was going out to meet his wife, as she had not returned, so I went on with my breakfast. It seems, however, that he came round back of me—I did not see him—and he struck me a violent blow in the face, followed instantaneously by another blow. Coming so immediately together, the two blows seemed like one assault. I heard 'Stop! stop!' cried by Neagle. Of course I was for a moment dazed by the blows. I turned my head round and I saw that great form of Terry's, with his arm raised and his fists clenched to strike me. I felt that a terrific blow was coming, and his arm was descending in a curved way, as though to strike the side of my temple, when I heard Neagle cry out, 'Stop! stop! I am an officer.' Instantly two shots followed. I can only explain the second shot from the fact that he did not fall instantly. I did not get up from my seat, although it is proper for me to say that a friend of mine thinks that I did; but I did not. I looked around and saw Terry on the floor. I looked at him and saw that peculiar movement of the eyes that indicates the presence of death. Of course it was a great shock to me. It is impossible for any one to see a man in the full vigor of life, with all those faculties that constitute life, instantly extinguished, without being affected, and I was. I looked at him for a moment, then rose from my seat, went around and looked at him again, and passed on. Great excitement followed. A gentleman came to me whom I did not know, but I think it was Mr. Lidgerwood, who has been examined as a witness in this case, and said: 'What is this?' I said: 'I am a Justice of the Supreme Court of the United States. My name is Judge FIELD. Judge Terry threatened my life, and attacked me, and the Deputy Marshal has shot him.' The Deputy Marshal was perfectly cool and collected, and stated: 'I am a Deputy Marshal and I have shot him to protect the life of Judge FIELD.' I cannot give you the exact words, but I give them to you as near as I can remember them. A few moments afterwards the Deputy Marshal said to me: 'Judge, I think you had better go to the car.' I said, 'Very well.' Then this gentleman, Mr. Lidgerwood, said: 'I think you had better.' And with the two I went to the car. I asked Mr. Lidgerwood to go back and get my hat and cane, which he did. The Marshal went with me, remained for some time and then left his seat in the car, and, as I thought, went back to the dining-room. (This is, however, I am told, a mistake, and that he only went to the end of the car.) He returned, and either

he or some one else stated that there was great excitement, that Mrs. Terry was calling for some violent proceedings. I must say here that, dreadful as it is to take life, it was only a question of seconds whether my life or Judge Terry's life should be taken. I am firmly convinced that had the Marshal delayed two seconds both he and myself would have been the victims of Terry."

In answer to a question whether he had a pistol or other weapon on the occasion of the homicide, Justice FIELD replied—

"No, sir. I have never had on my person, or used a weapon, since I went on the bench of the Supreme Court of the State, on October 13, 1857, except once." (That was on an occasion when he crossed the Sierra Nevada Mountains, in 1862.) "With that exception, I have not had on my person, or used a pistol or other deadly weapon."

Mr. Neagle in his testimony stated that, before the train arrived at Fresno, he got up and went out on the platform, leaving the train, and there saw Terry and his wife get on the cars; that when the train arrived at Merced, he spoke to the conductor, Woodward, and informed him that he was a Deputy United States Marshal; that Judge FIELD was on the train, and also Terry and his wife, and that he was apprehensive that when the train arrived at Lathrop, there would be trouble between those parties, and inquired whether there was any officer at that station, and was informed in reply that there was a constable there; that he then requested the conductor to send word to the officer to be at Lathrop on the arrival of the train, and that he also applied to other parties to induce them to endeavor to secure assistance for him at that place in case it should be needed.

The Deputy Marshal further stated that when the train arrived at Lathrop Justice FIELD went into the dining-room, he accompanying the Justice; that they took seats at a table; that shortly after they were seated, Terry and his wife entered the dining-room, his wife following him several feet in the rear; that when the wife reached a point nearly opposite Justice FIELD, she turned around and went out rapidly from the room, and, as appeared from what afterward followed, she went to the car to get her satchel. When she returned from the car the satchel was taken from her, and it was found to contain a pistol—revolver—containing six chambers, all of which were loaded with ball. This pistol lay on the top of the other articles in the satchel. The witness further stated that Terry passed down opposite Justice FIELD, to a table below where they were sitting; that in a few minutes, whilst Justice FIELD was eating, Terry rose from his seat, went around behind him—the Justice not seeing him at the time—and struck him two blows, one on the side and the other on the back of the head; that the second blow followed the other imme-

diately; that one was given with the right hand and the other with the left; that Terry then drew back his hand, with his fist clenched, apparently to give the Justice a violent blow on the side of his head, when he, Neagle, sprang to his feet, calling out to Terry, "Stop! Stop! I am an officer;" that Terry bore at the time on his face an expression of intense hate and passion, the most malignant the witness had ever seen in his life, and that he had seen a great many men in his time in such situations, and that the expression meant life or death for one or the other; that as he cried out those words, "Stop! Stop! I am an officer," he jumped between Terry and Justice FIELD, and, at that moment, Terry appeared to recognize him, and instantly, with a growl, moved his right hand to his left breast, to the position where he usually carried his bowie-knife; that, as his hand got there, the Deputy Marshal raised his pistol and shot twice in rapid succession, killing him almost instantly. He further stated that the position of Judge FIELD was such—his legs being at the time under the table, and he sitting—that it would have been impossible for him to have done anything even if he had been armed, and that Terry had a very furious expression, which was characterized by the witness as that of an infuriated giant. He also added, that his cry to him to stop was so loud that it could be heard throughout the whole room, and that he believed that a delay in shooting of two seconds would have been fatal both to himself and Justice FIELD.

The facts thus stated in the testimony of Justice FIELD and the petitioner, were corroborated by the testimony of all the witnesses to the transaction. The petitioner soon afterwards accompanied Justice FIELD to the car, and whilst in the car, he was arrested by a constable, and at the station below Lathrop was taken by that officer from the car to Stockton, the county seat of San Joaquin County, where he was lodged in the county jail. Mr. Justice FIELD was obliged to continue on to San Francisco without the protection of any officer. On the evening of that day, Mrs. Terry, who did not see the transaction, but was at the time outside of the dining-room, made an affidavit that the killing of Terry was murder, and charged Justice FIELD and Deputy Marshal Neagle with the commission of the crime. Upon this affidavit, a warrant was issued by a Justice of the Peace at Stockton against Neagle and also against Justice FIELD. Subsequently, after the arrest of Justice FIELD, and after his being released by the United States Circuit Court on *habeas corpus* upon his own recognizance, the proceeding against him before the Justice of the Peace was dismissed, the Governor of the State having written a letter to the Attorney-General of the State, declaring that the proceeding, if persisted in, would be a burning disgrace to the State, and the Attorney-General having advised the District Attorney of

San Joaquin County to dismiss it. There was no other testimony whatever before the Justice of the Peace, except the affidavit of Sarah Althea Terry, upon which the warrant was issued.

The petition was accordingly presented, on behalf of Neagle, to the Circuit Court of the United States for a writ of *habeas corpus* in this case, alleging, among other things, that he was arrested and confined in prison for an act done by him in the performance of his duty, namely, the protection of Mr. Justice FIELD, and taken away from the further protection, which he was ordered to give to him. The writ was issued, and upon its return the Sheriff of San Joaquin County produced a copy of the warrant issued by the Justice of the Peace of that county, and of the affidavit of Sarah Althea Terry, upon which it was issued.

A traverse to that return was then filed in this case, presenting various grounds why the petitioner should not be held, the most important of which were—

That an officer of the United States, specially charged with a particular duty, that of protecting one of the Justices of the Supreme Court of the United States, whilst engaged in the performance of his duty, could not, for an act constituting the very performance of that duty, be taken from the further discharge of his duty and imprisoned by the State authorities, and—

That, when an officer of the United States, in the discharge of his duties, is charged with an offense consisting in the performance of those duties, and is sought to be arrested, and taken from the further performance of them, he can be brought before the tribunals of the nation of which he is an officer, and the fact then inquired into.

John T. Carey, United States Attorney; *Richard S. Mesick*, *Samuel M. Wilson*, *William F. Herrin*, *W. L. Dudley*, *C. L. Ackerman*, *J. C. Campbell*, *H. C. McPike*, for petitioner.

G. A. Johnson, Attorney-General of the State of California; *J. P. Langhorne*; *Avery C. White*, District Attorney of San Joaquin County, California, for respondent.

SAWYER, Circ. J., September 14, 1889. The petitioner has sued out a writ of *habeas corpus*, returnable before the Court, alleging that he is unlawfully deprived of his liberty, and imprisoned, by virtue of a warrant issued by a Justice of the Peace of San Joaquin County, in this State, charging him with

a felonious homicide, whilst the act thus characterized was a lawful act performed in the discharge of his duties as an officer of the United States; and the first question presented is, whether this Court has jurisdiction to inquire into the truth of that allegation.

Upon the question of jurisdiction, Section 751, Rev. Stat., provides that—

"The Supreme Court and the Circuit and District Courts shall have power to issue writs of *habeas corpus*;"

and Section 752 further provides, that—

"The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty."

There is no limit in these provisions to the jurisdiction of these courts and judges to inquire into the restraint of liberty of any person. But Section 753 prescribes some limitations, among which is—

"The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody * * * for an act done, or omitted, in pursuance of a law of the United States, or of an order, process or decree of a court, or judge thereof; or is in custody, in violation of the Constitution, or of a law or treaty of the United States."

And this legislation, in the language of the Chief Justice, in *McCardle's case* (1867), 6 Wall. (73 U. S.) 325–6, in commenting upon the same provision in a prior act—

"[This legislation] is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court, and of every judge, every possible case of privation of liberty, contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction."

And again, in *Ex parte Royall* (1885), 117 U. S. 249, the Supreme Court says—

"[But] as the judicial power of the nation extends to all cases arising under the Constitution, the laws and treaties of the United States; as the privilege of the writ of *habeas corpus* cannot be suspended, unless when in cases of rebellion or invasion, the public safety may require it; and as Congress has power to pass all laws necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof; no doubt can exist as to the power of Congress thus to enlarge the jurisdiction of the courts of the Union, and of their justices and judges. That the petitioner is held under the authority of a State cannot affect the question of the

power or jurisdiction of the Circuit Court, to inquire into the cause of his commitment, and to discharge him, if he be restrained of his liberty in violation of the Constitution. The Grand Jurors who found the indictment, the Court into which it was returned and by whose order he was arrested, and the officer who holds him in custody, are all equally with citizens, under a duty, from the discharge of which the State could not release them, to respect and obey the supreme law of the land, 'any thing in the Constitution and laws of any State to the contrary notwithstanding,' and that equal power does not belong to the courts and judges of the several States; that they cannot under any authority conferred by the State, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the General Government acting under its laws, results from the supremacy of the Constitution and laws of the United States: *Ableman* v. *Booth* (1858), 21 How. (62 U. S.) 506; *Tarble's Case* (1871), 13 Wall. (80 U. S.) 397; *Robb* v. *Connolly* (1883), 111 U. S. 624. We are therefore, of opinion that the Circuit Court has jurisdiction, upon writ of *habeas corpus*, to inquire into the cause of appellant's commitment, and to discharge him, if he be held in custody in violation of the Constitution."

In the exercise of this jurisdiction there is no conflict between the authority of the State and of the United States. The State in such cases is subordinate, and the National Government paramount.

"The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity." *Siebold's case* (1879), 100 U. S. 392; see also *Tennessee* v. *Davis* (1879), Id. 257–8.

The exclusive authority of the State to determine whether an offense has been committed against the laws of the State, is now earnestly pressed upon our attention. In *Siebold's case*, the Court says—

"It seems to be often overlooked that a National Constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his State government is. Whenever the true conception of the nature of this Government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised toward this Government, in reference to the preservation of our liberties, than is proper to be exercised toward the State governments. Its powers are limited in number and clearly defined, and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the National and State governments shall be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them, according to a fair

and practical construction of the Constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other." 100 U. S. 394; see Id. 266–7.

This Court, then, has jurisdiction to inquire upon this writ into the cause of the imprisonment of the petitioner, and if, upon such inquiry, he is found to be "in custody for an act done or committed in pursuance of a law of the United States," then he is in custody in violation of the Constitution and laws of the United States, and he is entitled to be discharged, no matter from whom, or under what authority, the process under which he is held, may have issued—the Constitution and laws of the United States made in pursuance thereof, being the supreme law of the land.

The homicide in question, if an offense at all, is, it must be conceded, an offense under the laws of the State of California, and only the State can deal with it as such or in that aspect. It is not claimed to be an offense under the laws of the United States. But if the killing of Terry by Neagle was an "act done * * * in pursuance of a law of the United States," within the powers of the National Government, then it *is not*, and *it cannot* be, an offense against the laws of the State of California, no matter what the statute of the State may be, the laws of the United States being the supreme law of the land. A State law which contravenes a valid law of the United States, is in the nature of things, necessarily void—a nullity. It must give place to the "supreme law of the land." In legal contemplation there can no more be two valid laws which are in conflict, operating upon the same subject matter at the same time, than in physics two bodies can occupy the same space at the same time.

But, as we have seen by the authorities cited, it is the exclusive province of the Judiciary of the United States to ultimately and conclusively determine any question of right, civil or criminal, arising under the laws of the United States. It is, therefore, the prerogative of the National courts to conclusively construe the National statutes and determine whether the homicide in question was the result of an "act done in

pursuance of a law of the United States," and when that question has been determined in the affirmative, the petitioner must be discharged, and the State has nothing more to do with the matter. All we claim is the right to determine the question, was the homicide the result of "an act done in pursuance of a law of the United States?" and if so, discharge the petitioner.

As incidental to and involved in that question, it is necessary to inquire whether the act of the petitioner was performed under such circumstances as to justify it. If it was, then he was in the line of his duty. If not, then it was outside his duty. We do not make the inquiry at all for the purpose of determining whether the act was an offense, or justifiable under the statutes of the State. We do not assume to consider the case in that aspect at all. We simply determine whether it was an act performed in pursuance of a law of the United States. Nor do we act in this matter because we have the slightest doubt as to the impartiality of the State courts, and their ability and disposition to, ultimately, do exact justice to the petitioner. We have not the slightest doubt or apprehension in that particular; but there is a principle involved. The question is, has the petitioner *a right* to have his acts adjudged, and, if found to have been performed in the strict line of his authority and duty, a further right to be protected by that sovereignty whose servant he is and whose laws he was executing? If he has that right, then there is no encroachment upon the State jurisdiction, and this Court must necessarily entertain his petition and determine his rights under it, and under the laws of the United States. It has no discretion. It cannot decline to hear him, without an utter disregard of one of the most important duties imposed upon it by the Constitution and laws of the United States. What the State tribunals might, or might not do, in this particular instance, is not a matter for a moment's consideration. The question is, what are the rights of the petitioner as to having his case heard and disposed of in the courts of the sovereignty whose servant he is and whose laws he was employed in executing. If he has a right to be heard in this Court, then we must hear him, willing or unwilling. There is no alternative. Whether

the writ should issue, in this case, was not a question of "expediency," and whether the petitioner shall be discharged or remanded is not a question of "policy" or "comity," as suggested in some quarters. It is a question of personal right and personal liberty, arising under the Constitution and laws of the United States, which the Court cannot ignore. There is a class of cases, of which *Ex parte Royall* is an example, in which the Court may exercise a discretion as to the *time* of interference, but, in our opinion, this is not one of them: *Ex parte Royall* (1885), 117 U. S. 251.

But if it rests in our discretion to discharge or remand the petitioner to the State courts, to be there first tried for an offense against the State, while we are satisfied that he is entitled to be discharged, to what useful end would he be sent back, since upon being tried and convicted he would still be discharged by the National courts on *habeas corpus*, if the act should appear to them to have been performed in pursuance of a law of the United States? This would be but to put the State to great useless expense, and subject the petitioner, if guilty of no offense, to unjust imprisonment in violation of his legal rights, until his trial could be had, and his writ of *habeas corpus* afterwards again sued out, heard and decided, when the result, in all probability, would at last be the same. Evidently, public justice demands that the case should be "summarily" decided now, as required by Section 761, Rev. Stat. The Court has no right to trifle with the petitioner's constitutional rights, by unnecessarily subjecting him to unjust imprisonment, great expense and vexatious delays. In case of a remand and conviction, the National courts must hear and decide the case at last. Far better for all concerned, that they should decide it now, and forever end it. We have no desire to usurp a jurisdiction that does not belong to us. We have enough to do in exercising the admitted jurisdiction conferred upon us, without seeking to enlarge it in the smallest particular, but we must perform our duty as we understand it, be the consequences what they may.

The Statutes of the United States also make ample provision for giving full effect to the jurisdiction of this Court in cases where the petitioner alleges that he is restrained of his liberty

in violation of the Constitution or of a law of the United States, in Section 766, which reads as follows, to wit—

"Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any State court, or by or under the authority of any State, for any matter so heard and determined, or in process of being heard and determined, under such writ of *habeas corpus*, shall be deemed null and void."

It is, therefore, only necessary, in order to dispose of the case, to inquire and ascertain whether the petitioner is in custody for an act done in pursuance of a law of the United States.

As we have seen from the statement of facts, Mr. Justice FIELD, of the United States Supreme Court, allotted to the Ninth Circuit, was traveling, officially, from one part of his circuit to another, in pursuance of the requirements of the statutes of the United States, for the purpose of holding a Circuit Court. By reason of threats against his life made by dissatisfied litigants, generally known and published in the newspapers and brought to the knowledge of the United States Marshal for the Northern District of California, and by him called to the attention of the Attorney General of the United States, that officer directed the Marshal to furnish the Justice with protection while thus engaged in the performance of his judicial duties on the circuit. The Marshal, deeming it proper, furnished the necessary protection by assigning that duty to the petitioner, who was a United States Deputy Marshal. The claim is that the petitioner, as such Deputy Marshal, was affording the only protection practicable to Justice FIELD, in the lawful discharge of his duty, when the homicide was committed, and that the killing was necessary for the preservation of the lives of both Justice FIELD and himself, at the time the fatal shot was fired. The homicide was committed at Lathrop, and not upon land purchased by the United States with the consent of the State for the needful uses of the United States, in pursuance of Article I, Section 8, of the Constitution.

Conceding the points to be as stated, do they present a case of an act performed in pursuance of a law of the United States, subject to their jurisdiction and to the jurisdiction of this

Court, and is the petitioner held under an arrest on a charge of murder by the State, "in custody in violation of the Constitution or laws of the United States," within the meaning of the statute?

It is urged that, since the homicide was committed in the State at large, and not in the courthouse, or upon land within the exclusive jurisdiction of the United States, the question as to whether the homicide is murder, is a question arising exclusively under the laws of the State, and that it can be investigated and determined by the State courts alone. It is admitted on the part of the State, that the United States has exclusive jurisdiction over the Custom House Block and "over all places purchased by the consent of the Legislature of the State, in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings," in pursuance of Section 8, Article I, of the National Constitution, and that the State has no jurisdiction whatever of any offense committed in such places. But it is contended that the United States has no jurisdiction of offenders outside the lands so purchased, in other portions of the State, but that in the State at large the jurisdiction of the State is exclusive. This proposition, like most others urged by those who insist on extreme State rights doctrines, wholly ignores the principle that there can be no legal conflict, or inconsistency, in matters wherein the State is subordinate, and the United States paramount—where the Constitution and laws of the United States are the supreme law of the land. We have already seen that although in certain cases the courts of the United States have jurisdiction to discharge on *habeas corpus*, prisoners held in custody by the State courts in violation of the Constitution and laws of the United States, yet that the State courts "cannot under any authority conferred by the State, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the general government acting under such laws," and that this "results from the supremacy of the Constitution and laws of the United States." This principle, established in the *Booth* and *Tarble* cases, was recently properly recognized by the Supreme Court of California, when upon the return of the writ of *habeas*

corpus in *Terry's* case, it appearing that he was in custody by virtue of a judgment of the United States Circuit Court, it declined to require the sheriff to produce his body. As the powers and duties of the State and National courts are by no means reciprocal, in this class of cases, so they are not reciprocal in the matter of territorial jurisdiction mentioned, as claimed on the part of the State. The Constitution and laws of the United States, as to those matters wherein they are supreme, extend over every foot of the territories of the United States, and the jurisdiction of its courts to enforce rights derived thereunder, is as extensive as the territory to which they are applicable.

In *Siebold's case*, the Supreme Court, in reply to an argument in favor of a wide extension of State rights, uses the following language peculiarly applicable to the point now under consideration—

"Somewhat akin to the argument which has been considered, is the objection, that the Deputy Marshals, authorized by the Act of Congress to be created, and to attend the elections, are *authorized to keep the peace;* and that this is a duty which belongs to the State authorities alone. It is argued *that the preservation of peace and good order in society is not within the powers confided to the Government of the United States, but belongs exclusively to the States.* Here, again, we are met with the theory that the Government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that Government. We hold it to be an incontrovertible principle, that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil, the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."

"This power to enforce its laws, and to execute its functions in all places, does not derogate from the power of the State to execute its laws, at the same time, and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. 'This Constitution, and all laws which shall be made in pursuance thereof, shall * * * be the supreme law of the land.'" (100 U. S. 394–5.)

And again—

"The argument is based on a strained and impracticable view of the nature and powers of the National Government. *It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have the power to command obedience, to preserve order and keep the peace; and no person or power in this land*

has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction." (Id. 396.)

The power to keep the peace is a police power, and the United States has the power to keep the peace in matters affecting its sovereignty. There can be no doubt, then, that the jurisdiction of the United States is not affected by reason of the place—the locality—where the homicide occurred. If the locality is a necessary element of jurisdiction, a majority of the offenses created by the statutes would be out of their jurisdiction, and the statutes creating such offenses would be nullities, and practically useless.

For example, for a quarter of a century, the United States Courts in this State were held in rented buildings, owned by private parties. They had no jurisdiction over them, under the provision of Section 8, Article I, of the National Constitution; and no jurisdiction other than that had over other portions of the country to which the Constitution and its laws extended. Had an assault been committed in open Court upon the Judge, in one of these buildings, and the assailing party been slain by the Marshal, in protecting the Judge, under circumstances excusing or justifying the homicide, would it be pretended that the Court would have no jurisdiction to protect him from interference by the State Government? Or, have the United States and its courts no jurisdiction over the offense of resisting a United States Marshal in the lawful execution of the process of the courts? or over the crime of counterfeiting the coin or forging the bonds or other securities of the United States, or other offenses against the laws, unless the offense is committed in a place under the exclusive jurisdiction of the United States? Such a claim would be preposterous.

In the case of *Tennessee* v. *Davis* (1879), 100 U. S. 257, the defendant was indicted for murder in killing one Haynes, while he was engaged in discharging his duties as a Deputy Collector of Internal Revenue of the United States, which killing Davis claimed was in self defense. The case was removed to the Circuit Court of the United States under Section 643, Rev. Stat. It was contended that this Act was an encroachment upon State rights, since it took away the right of the State to determine and execute its own criminal laws, and was, there-

fore, unconstitutional. The Supreme Court sustained the Act. It was held "that the United States is a government with authority extending over all the territory of the Union, acting upon the State and the people of the State." In deciding the case the Court said—

"As was said in *Martin* v. *Hunter* (1816), 1 Wheat. (14 U. S.) 363, the 'General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its Constitutional powers.' It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State Court, for an alleged offense against the laws of the State, yet warranted by the Federal authority they possess, and if the General Government is powerless to interfere at once for their protection; if their protection must be left to the action of the State Court—the operations of the General Government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the National Government, and in obedience to its laws. It may deny the authority conferred by those laws. The State Court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the Government. And even if, after trial and final judgment in the State Court, a case can be brought into the United States Court for review, *the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.*"

"We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its *sovereignty* extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it." *Tennessee* v. *Davis* (1879), 100 U. S. 262–3.

These expositions of the territorial extent of the jurisdiction of the General Government are authoritative and conclusive, and the result is that, wherever the Constitution and laws of the United States operate at all, the State laws in conflict with them are subordinate, and those of the United States are supreme and paramount.

Numerous cases are reported in the books, wherein parties arrested for offenses under the State laws, for acts performed in the discharge of duties imposed by the laws of the United States, have been discharged from imprisonment on *habeas corpus* by the United States Courts, in consonance with these

principles, now authoritatively established by the Supreme Court of the United States, in the cases cited, and others in the same line.

Thus, in *Ex parte Jenkins, and others* (1853), 2 Wall, Jr., 521, Deputy United States Marshals, who were arrested on the warrant of a justice of the peace in Pennsylvania, for shooting and wounding a negro, who resisted an arrest attempted under a warrant issued by the United States Court for a fugitive slave, Mr. Justice Grier, of the United States Circuit Court, took jurisdiction and discharged the petitioners, under the Act of 1835, since carried into the Revised Statutes, as part of section 753, under which this case arises. After their discharge, they were arrested again, in a suit by the negro for trespass, upon a warrant issued by a judge of the Supreme Court of Pennsylvania, and again discharged on *habeas corpus* by the United States Circuit Court. After this they were indicted for the shooting and wounding of the negro, by the grand jury of Luzerne County, and a third time released on *habeas corpus*. In the first of these cases Mr. Justice GRIER observes—

"What, then, have we power to do, on the return of the writ?" "The writ of *habeas corpus* is a high prerogative writ known to the common law: the great object of which is the liberation of those who may be in prison without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment. It brings the body of the prisoner up, together with the cause of his commitment. The Court can, undoubtedly, inquire into the sufficiency of that cause." * * * "Warrants of arrest issued on the application of private informers, may show on their face a *prima facie* charge sufficient to give jurisdiction to the justice; but it may be founded on mistake, ignorance, malice, or perjury. To put a case very similar to the present—A tells B that he has seen C kill D. B runs off to a justice, swears to the murder boldly, without any knowledge of the facts, and takes out a warrant for C, who is arrested and imprisoned in consequence thereof. C prays a *habeas corpus*, and shows that he was the sheriff of the county, and hanged D in pursuance of a legal warrant. If a Court could not discharge a prisoner in such a case, because the warrant was regular on its face, the writ of *habeas corpus* is of little use."

"The authority conferred on the judges of the United States by this Act of Congress gives them all the power that any other Court could exercise under the writ of *habeas corpus*, or gives them none at all. If under such a writ they may not discharge their officer, when imprisoned 'by any authority,' for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the Act was passed. Is the prisoner to be brought before them only that they may *acknowledge their utter impotence to protect him?*"

In *Ex parte Robinson* (1855), 6 McLean 355, Mr. Justice McLEAN held that "a writ of *habeas corpus* may issue to relieve an officer of the Federal Government who has been imprisoned under State authority for the performance of his duty." In the course of the decision the learned Justice observes—

"It is a general principle of law, to which I know of no exception, that the laws of every government shall be construed by itself; and such construction is acted upon by the judiciary of all other countries. By the Federal Constitution, 'the judicial power of the United States is declared to be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time order and establish.' Under this provision, the judiciary of the Union gives a construction to the laws which is obligatory on the State tribunals. The Constitution again declares, 'the Constitution and laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.'" (Id. 362.)

Thus, it is the exclusive prerogative of the National Courts to finally determine, whether an act performed by one of the officers of the United States, and especially an officer of the Court itself, is done in pursuance of a law of the United States, or whether, when under arrest for acts performed in connection with his office, he is "in custody in violation of the Constitution or of a law of the United States."

In the case of *U. S. ex rel. Roberts* v. *Jailer of Fayette County, Kentucky* (1867), 2 Abb. (U. S.) 265, a special Deputy United States Marshal was arrested, under the State laws, on a charge of murder, for a homicide committed by him in attempting to arrest one Cull upon a warrant issued by a Commissioner of the United States Circuit Court, for offenses charged to have been committed under the internal revenue laws. Upon the hearing, the United States Circuit Court found that the homicide was committed in the performance of "an act done in pursuance of a law of the United States, or of a process of a Court or Judge of the same," and discharged the petitioner. The question of the jurisdiction of the Court, and the facts, were elaborately discussed.

So, *In re Ramsey* (1879), 2 Flip. 451, the prisoner was a Deputy United States Marshal, in custody by order of a State

Court, on a charge of murder, the homicide having been committed in an attempt to arrest, upon a warrant issued by the United States Courts, the party slain. The Court found that the act was done in pursuance of a law of the United States; that petitioner was justified in the act which he performed, and discharged him. See, also to the same effect, *In re Neill* (1871), 8 Blatch. 156, 167; *In re Farrand* (1867), 1 Abb. (U. S.) 140; *Electoral College of South Carolina* (1876), 1 Hugh. C. Ct. 571: *In re Hurst* (1879), 2 Flip. 510, and cases collected in vol. 29 Myers, Fed. Decisions, 698. Thus it appears to be settled, beyond controversy, that, where a party is in custody by State authority, for an act done, or omitted to be done, in pursuance of any specific provision of a statute of the United States, imposing a duty upon him, or for an act performed justifiable by the circumstances of the case, in order to enable him to perform that duty, or in the execution of any order, or process, or decree, of a Court of the United States, or of a Judge thereof, the Courts of the United States have jurisdiction to discharge him on *habeas corpus*, under Section 753 of the Revised Statutes. In such a case, the laws of the United States are supreme, and the act cannot be an offense against the laws of the State, and as we have before seen, whether an act is performed in pursuance of a law of the United States, is a question exclusively for the United States Courts to authoritatively and conclusively determine. They must interpret finally the laws of the United States. With their decision the State cannot interfere. When the United States Courts have spoken on the subject, the State has nothing more to do with it.

The only remaining questions to determine are:

1. Was the homicide now in question, committed by petitioner, while acting in discharge of a duty imposed upon him by the Constitution or laws of the United States, within the meaning of Section 753 of the Revised Statutes?

2. Was the homicide necessary, or was it reasonably apparent to the mind of the petitioner, at the time, and under the circumstances then existing, that the killing was necessary in order to a full and complete discharge of such duty?

It is urged that there is no statute, which, specifically, makes it the duty of a Marshal, or a Deputy Marshal, to protect the Judges of the United States Courts while out of the court-room, traveling from one point to another in the circuit, on official business, from the violence of litigants, who have become offended at adverse decisions made by such Judges in the performance of their judicial duties, and that Marshals, or deputies, so engaged, are not within the provisions of Section 753 of the Revised Statutes.

It will be observed that the language of the provision of Section 753 is "an act done * * * in pursuance of a *law* of the United States," not in pursuance of a ***statute*** of the United States.

The statutes of Congress, in their express provisions, do not present all the law of the United States. Their incidents and implications are as much a part of the law, as their express provisions. When they prescribe duties, provide for the accomplishment of certain designated objects, or confer authority in general terms, they carry with them all the powers essential to effect the ends designed.

[See note on page 624.]

Says the Supreme Court in *Tennessee* v. *Davis* (1879), 100 U. S. 264, quoting with approbation from Chief Justice MARSHALL—

"'It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an Act of Congress to imply, without expressing, this very exemption from State control. * * * The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. *It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any Act of Congress.* It is incidental to, and is implied, in the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone—that is, the judicial power is the instrument employed by the Government in administering this security.'"

If the officers referred to in the preceding passage are to be protected while in the line of their duty, without any special law or statute requiring such protection, are not the Judges of the Courts—the principal officers in a department of the Government second to no other—also to be protected, and are not their executive subordinates—the Marshals and their deputies—to be shielded from harm by the national laws, while honestly engaged in protecting the heads of the Courts from assassination? When it was argued in *Siebold's case* that it was not in the power of the United States to authorize the United States Marshals to "*keep the peace*" *at Congressional elections*, "*that the preservation of peace and good order in society is not within the powers confided to the Government of the United States, but belonged exclusively to the State*," we have seen the answer of the Supreme Court to that argument, in cases where the rights and interests of the *United States Government were involved in the matter of keeping the peace*—

"We hold it to be an incontrovertible principle," said the Court, "that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, *and hence the power to keep the peace to that extent*."

And again—

"Why do we have Marshals at all if they cannot physically lay their hands on persons and things, in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the Courts, must they call upon the nearest constable for protection? Must they rely upon him to use the requisite compulsion, and to keep the peace, whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the National Government out of the United States, and relegate it to the District of Columbia, or perhaps some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old Confederation." 100 U. S., 395–6.

In this particular case, the petitioner, long before he reached Lathrop, endeavored, through the conductor and the proprietor of the eating-house at that place, to have "*a constable*" in readiness, on the arrival of the train, *to keep the peace*, but without success. When too late to prevent the tragedy, the constable appeared and arrested the petitioner, for performing

the duty which it is now claimed devolved exclusively upon himself, or some other peace officer of the State.

Had the United States in this instance relied upon another government—the State of California—to keep the peace as to one of their most venerable and distinguished officers—one of the Judges of their highest Court—in relation to matters concerning the performance of his official duties, they would have leaned upon a broken reed, and there would now in all probability be a vacancy on the bench of one of the most august judicial tribunals in the world, and the deceased—the would-be assassin—might, perhaps, be a tenant of the Stockton jail, to be disposed of by another government. The case affords a striking illustration of the necessity for the United States to protect their own officers while in the discharge of their duties, and by such protection, protect the Nation itself.

The result was, that instead of arresting the conspirator in the contemplated murder—the wife of the deceased, armed with a loaded revolver till relieved of it by a citizen—threatening death to Justice FIELD, calling upon the bystanders to aid her, and attempting to enter the car, with the avowed purpose of compassing his death, the officer of the United States assigned by his Government to the special duty of protecting the Justice's life against these very parties, while in the actual performance of the duties so assigned him, was, himself, arrested, without warrant, and disarmed by an inferior officer of the State, and interrupted in the discharge of those momentous duties, thereby leaving his charge helpless, and without the protection provided by the Government he was serving, at a time when such protection seemed most needed.

Had Neagle been a Deputy Sheriff of San Joaquin County, assigned by his superior to this very duty of protecting the life of Justice FIELD, under the State laws, and, in the performance of his duties, committed the homicide in all other respects under precisely the same circumstances, would he have been arrested by the constable of Lathrop, without a warrant, and disarmed with such inconsiderate haste, and thereby prevented from further performing his duty to protect the life and person of Justice FIELD, leaving him to pursue the remainder of his

journey without protection? Yet the constable was informed that Neagle was acting as a Deputy United States Marshal, under the orders of his superiors, for the protection of the life and person of a Justice of the Supreme Court of the United States.

We do not wish to be regarded as now calmly and deliberately looking back upon the scene, and sitting in judgment upon the action of the constable, or as passing censure upon his zeal. He, doubtless, in the emergency, where time for consideration was short, and the facts not fully appreciated, acted according to the best dictates of his judgment, necessarily hastily formed. But when the State now comes in, after an arrest upon a warrant issued upon such flimsy testimony as that presented, and deliberately claims the exclusive right to sit in judgment upon the acts of the United States Deputy Marshal, performed not upon his own interpretation of the law, but upon that of the Attorney-General of the United States, who may be presumed to possess some knowledge of his powers and duties, it is well to consider the circumstances from a standpoint presenting a view of both sides of the question.

In matters of the public peace, in which the National Government is concerned, the Marshals and Deputy Marshals, within the scope of their authority, *are National peace officers*, with all the statutory and common law powers appertaining to peace officers. Is not the National public peace involved, when a deadly assault is unexpectedly made upon a Judge in open Court, in which the Marshal and his deputies, seeing the assault, are both authorized and bound on their own motion, without any previous order or command, to interpose and use sufficient force to quell the disturbance, and subdue the parties making it? Yet where is there any specific provision of the statute imposing that duty upon them? The Marshal is required to attend Court, but it is not provided what he shall do in Court. To what end shall he be in Court if not to keep order, and, if necessary, to protect the Judges from violence, by force, or any practicable means? But there is no statute requiring it in terms.

The general duties of Marshals are provided for in Section 787, which reads as follows—

"It shall be the duty of the Marshal of each district to attend the District and Circuit Courts when sitting therein, and execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty."

There is no more authority specifically conferred upon the Marshal by this section, to protect the Judge from assassination, in open Court, without a specific order or command, than there is to protect him out of Court, when on the way from one Court to another, in the discharge of his official duties. And the assassination in Court, as well as out of it, might well be accomplished before the Judge would be aware of his danger, and before it would be possible to give a command or order to the Marshal for his protection. The authority exists in the one case, as in the other, from the nature of the office, and the powers arising under the common law, recognized and in use in the country, and, in the nature of things, inherent in the office. The very idea of a government composed of executive, legislative and judicial departments, necessarily comprehends the power to do all things through its appropriate officers and agents, within the scope of its general governmental purposes and powers requisite to preserve its existence, protect it and its ministers and give it complete efficiency in all its parts. It necessarily and inherently includes power in its executive department to enforce the laws, keep the national peace with regard to its officers while in the line of their duty, and protect, by its all-powerful arm, all the other departments and the officers and instrumentalities necessary to their efficiency, while engaged in the discharge of their duties.

In language attributed to Mr. ex-Secretary Bayard, used with reference to this very case, which we quote, not as a controlling judicial authority, but for its intrinsic, sound, common sense—

"The robust and essential principle must be recognized and proclaimed, that the inherent powers of every government which is sufficient to authorize and enforce the judgment of its courts, are, equally, and at all times, and in all places, sufficient to protect the individual judge, who, fearlessly and conscientiously in the discharge of his duty, pronounces those judgments."

Our jurisprudence is derived from and founded upon that of England, and our judges and officers are substantially the

same. They have corresponding duties imposed upon them, and inherently possess corresponding executive powers, to enable them to effectively perform their duties. From the foundation of our Government, many of their common law duties have been performed, and common law powers exercised, without specific or statutory direction, and without question; and the common law principles governing them, except so far as inapplicable, or modified by statute, still remain in force.

The observation of the Supreme Court of California, in the *Estate of Apple* (1885), 66 Cal. 432, in which State a Code has been adopted, with respect to the common law not abrogated or modified by the Code, is applicable here. Said the Court—

"The Code establishes the law of this State respecting the subjects to which it relates; but this, of course, does not mean that there is no law with respect to such subjects except that embodied in the Code. When the Code speaks, its provisions are controlling, and they are to be liberally construed, with a view to effect its objects and promote justice—the rule of the common law that statutes in derogation thereof are to be strictly construed, having been abolished here; but where the Code is silent, the common law governs."

So here, where the duties of the Marshal are not limited, or specifically defined, by the statute, we must look to the powers and duties of sheriffs at common law for them, so far as those duties come within the purposes and powers of the National Government.

There are many acts and duties daily performed by the Marshals, and by other officers, that are not specifically pointed out or defined by the statute. The Marshals are in daily attendance upon the Judges, and performing official duties in their chambers. Yet no statute specifically points out those duties or requires their performance. Indeed, no such places as chambers for the Circuit Judges, or Circuit Justices, are mentioned at all in the statutes. The Judges' chambers do not appear to have any "local habitation." The Justices of the Supreme Court at Washington have, in fact, no chambers otherwise than as they study and do their work out of Court, at rooms in their own residences. We have in the San Francisco Courthouse rooms that we call chambers, in which the work of the Judges out of Court is in part, but not wholly, performed. I apprehend that the Marshal would as clearly be authorized

to protect the Judges here in chambers as in the courtroom. All business done out of Court by the Judge, is called chamber business. But it is not necessary to be done in what is usually called chambers. Chamber business may be done, and often is done, on the street, in the Judge's own house, at the hotel where he stops, when absent from home, or it may be done *in transitu*, on the cars in going from one place to another, within the proper jurisdiction to hold court. Mr. Justice FIELD could, as well, and as authoritatively, issue a temporary injunction, grant a writ of *habeas corpus*, an order to show cause, or do any other chamber business for the district, in the dining-room at Lathrop, or in the cars, as at his chambers in San Francisco, or in the courtroom. He could have made a writ of *habeas corpus* returnable before himself on the car, and lawfully heard and decided the case while on his passage to San Francisco. The chambers of the Judge, where chambers are provided, are not an element of jurisdiction, but are a convenience to the Judge, and to suitors—places, where the Judge at proper times can be readily found, and the business conveniently transacted. But the chambers of the Judge, as a legal entity, are something of a myth. For the purposes of jurisdiction, the chambers of the Judge are wherever he happens to be in his circuit, or district, when the exigencies of the case call for the transaction of chamber business, and a Judge is as clearly engaged in the discharge of the duties of his office, when going from one place of holding court to another, for the purpose of holding court, and just as much entitled to protection from his own government against murderous or other assaults, from desperate suitors, on account of his judicial action, as when actually engaged in business at chambers, or in holding court. In England, whence we derive our jurisprudence, the High Sheriff of the shire was the keeper of the King's peace—that is to say, the keeper of the peace of the sovereignty which the King represents. So here, I take it, under the authorities cited, the Marshal is the keeper of the peace of the Government of the sovereignty he serves, within the scope of the supreme powers of that Government. In England, in early days, it was the duty, in every shire, of the sheriffs not only to attend the courts, but to attend the Judges through

their circuits. They met the Judges at the border of the shire, and attended them until they left it at the border of another: Dalton, on the Office and Authority of Sheriffs, chapter 98, p. 369, published in 1682. See also 40 Alb. Law Journal, 161. Such is also understood to have been the practice in early days in a number of the States. From the advancing state of civilization this practice has, doubtless, generally become unnecessary for the safety of the Judges, and it has fallen into desuetude. But it does not follow that the power to thus protect them has been abolished or become extinguished. It simply remains latent or dormant, ready to be called into action whenever the exigencies of the case or times require it. And how could there possibly be a more urgent occasion for reviving the practice and calling it into action, than the recent journey of Justice FIELD to Los Angeles and return on official business?

Upon general, immutable principles, the power must necessarily be inherent in the executive department of any government worthy the name of government, to protect itself in all matters to which its authority extends, and this necessarily involves the power to protect all the agencies and instrumentalities necessary to accomplish the objects and purposes of that government. In the National Government of the United States, the judiciary constitutes one of its most important branches. Unlike the judiciary of other nations, it is invested with the jurisdiction to pass, finally and conclusively, upon the powers of the legislative and executive departments of the Government, and to confine them within their constitutional limits. It is, therefore, the balance wheel of the National Government, that keeps it running regularly and smoothly within its proper domain. Impotent, indeed, must be the executive branch of the Government, if it is not empowered to protect the lives of the Judges of the highest branch of its judiciary, from assault and assassination, on account of their judicial decisions, by desperate disappointed litigants, while passing from point to point within their territorial jurisdiction in the discharge of their high functions and duties. We cannot think the power can be wanting, even if there were no constitutional or statutory provision governing the case. It seems impossible that the National Government should be left to the mercy,

good will, or complacency of the State, to afford that protection to its Judges, that the United States, if worthy to be called a Nation, are bound themselves to furnish.

As a further example of laws, not ordained by specific statutory enactments, see those respecting punishment for contempts. For forty years after the organization of the National Government, down to 1831, there was no statute which specifically defined contempts of court: *Ex parte Robinson* (1873), 19 Wall. (86 U. S.) 510; *Ex parte Terry* (1888), 128 U. S. 302–3; *Ex parte Savin* (1888), 131 Id. 275. But the courts, nevertheless, exercised the power, necessarily, from the nature of things inherent in every court, to protect itself, its dignity and its officers, by the punishment of many acts as contempts of its authority. The first specific Act upon the subject passed by Congress, was not an Act enlarging the power of the court, but it was, on the contrary, a restriction of the powers already exercised within certain defined limits. The act was passed at the instance of Senator Buchanan, to limit the power of the court theretofore exercised, to punish for contempts, as a sequel to the impeachment of a United States Judge for the District of Missouri. The Act was passed March 2, 1831, and is entitled, "An Act declaratory of the law concerning Contempts of Court:" 4 U. S. Stat. at Large, 487. The first section does not *grant* the power to punish for contempts, but expressly recognizes the existing power, and, in express terms, thereafter limits the power to certain enumerated cases. In order that those who were before subject to punishment for contempt should not escape the penalties due their acts, section 2 of the statute makes certain acts, before punishable as contempts, offenses against the laws of the United States, punishable by the less summary and more deliberate proceeding on indictment and trial by a jury. Many of the acts under that Act recognized as punishable as contempts, as being necessary to the prompt and summary vindication of the authority of the court, are also indictable offenses under other statutes.

This statute of 1831 has been carried into the Revised Statutes, Section 1 of that Act having been re-enacted in Section 725 of the Revised Statutes, giving it a granting, as well as a restricting form, but in no sense changing its purpose or

meaning. And Section 2 is now found in Section 5399 of the Revised Statutes, as a part of the criminal code of the Nation.

Did anybody ever doubt, or does anybody now doubt, that the power of the United States Courts to punish contempts, from the organization of the Government down to 1831, was just as ample, and that it was just as much a part of the law of the United States, inherently vested in the Courts, as it was after the passage of the Act of 1831, or as it is now under the same provisions carried into the Revised Statutes?

Yet there was no specific provision of the statutes defining contempts. It was a power, however, necessarily inherent in the Courts. It is involved in the very idea of a Court, having power to administer the laws of the land. It would be impossible for Courts to perform their functions and administer the laws without it. And as so inherent, the power to punish various acts not mentioned for contempt was as much a part of the law of the United States as if ordained by a specific provision of the Statutes of the United States, and the authority of the Marshal to protect the Judges is a cognate power, also necessarily inherent in the office he holds. Thus there is much law of the United States, not now found in terms in the Statutes, but as valid and binding upon the people, and upon the States, as if it were specifically and definitely therein expressed. See *U. S.* v. *Hudson* (1812), 7 Cranch (11 U. S.) 32–4; *Matter of Meador* (1869), 1 Abb. (U. S.) 324; *In re Buckley* (1886), 69 Cal. 18.

But we are not without constitutional and statutory provisions, broad enough and specific enough, as we think, to cover the case. The National Constitution, providing a government for sixty-five millions of people, covers but a very few pages, but it seems to be amply sufficient for the purposes intended. In prescribing the duties of the President, in the terse but comprehensive language of Section 3, Article II, it provides that "he shall take care that the laws be faithfully executed." This makes him the executive head of the Nation, and gives him all the authority necessary to accomplish the purposes intended—all the authority necessarily inherent in the office, not otherwise limited. Congress, in pursuance of powers vested in it, has provided for seven departments, as

subordinate to the President, to aid him in performing the executive functions conferred upon him. Section 346, Rev. Stat., provides that one of the executive departments shall be "known as the Department of Justice," and that there shall be "an Attorney-General, who shall be the head thereof." He has general supervision of the executive branch of the National Judiciary, and Section 362 provides, as a portion of his powers and duties, that—

"The Attorney-General shall exercise general superintendence and direction over the Attorneys and Marshals of all the districts of the United States and Territories as to the manner of discharging their respective duties; and the several District Attorneys and Marshals are required to report to the Attorney-General an account of their official proceedings, and of the state and condition of their respective offices, in such time and manner as the Attorney-General may direct."

Section 788, Rev. Stat., provides that—

"The Marshals and their deputies shall have, in each State, the same powers in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof."

By Section 817 of the Penal Code of this State, the sheriff is a "peace officer." By section 4176, Pol. Code, he is "to preserve the peace" and "prevent and suppress breaches of the peace." The Marshal is, therefore, in accordance with the decision of the Supreme Court already referred to, and under the provisions of the statute above cited, "a peace officer," so far as keeping the peace, in any matter wherein the National powers of the United States are concerned, and as to such matters he has all the powers of the sheriff, as a peace officer, under the laws of the State. He is, in such matters, "to preserve the peace" and "prevent and suppress breaches of the peace." An assault upon, or an assassination of, a Judge of a United States Court, while engaged in any matter pertaining to his official duties, on account, or by reason, of his judicial decisions, or action in performing his official duties, is a breach of the peace, affecting the authority and interests of the United States, and within the jurisdiction and power of the Marshal, or his deputies, to prevent, as a peace officer of the National Government. Such an assault is not merely an assault upon the person of the Judge, as a man. It is an assault upon the National Judiciary, which he represents, and through

it an assault upon the authority of the Nation itself. It is, necessarily, a breach of the National peace. As a National peace officer, under the conditions indicated, it is the duty of the Marshal and his deputies to prevent a breach of the National peace by an assault upon the authority of the United States, in the person of a Judge of its highest Court, while in the discharge of his duty. If this be not so, in the language of the Supreme Court before cited, "Why do we have Marshals at all?" What useful functions can they perform in the economy of the National Government?

The Constitution of the United States provides for a Supreme Court, with jurisdiction more extensive in some particulars than that conferred on any other national judicial tribunal. If the Executive Department of the Government cannot protect one of these Judges, while in the discharge of his duty, from assassination, by dissatisfied suitors, on account of his judicial action, then it cannot protect any of them, and all the members of the Court may be killed, and the Court itself exterminated, and the laws of the Nation by reason thereof, remain unadministered and unexecuted. The power and duty imposed on the President to "take care that the laws are faithfully executed," necessarily carries with it all power and authority necessary to accomplish the object sought to be attained, and, certainly, the power and duty to protect from the deadly assaults of desperate suitors, the lives of the Judges of the highest Court in the Nation, while engaged in the lawful discharge of their duties.

As we have before seen, neither Constitution nor Statutes can, or do, anticipate and point out, specifically, every possible right or duty to be covered and secured. They must, necessarily, be general. In the passage already cited from *Tennessee* v. *Davis*, the Supreme Court, in speaking of certain officers, says—

"It has never been doubted, that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any Act of Congress. It is incidental to, and is implied in, the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the Government in administering this security." (100 U. S. 265.)

And in *United States* v. *Macdaniel* (1833), 7 Pet. (32 U. S.) 14, similar views were expressed. Said the Court—

"A practical knowledge of the action of any one of the great departments of the Government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by law; but it does not follow that he *must* show a statutory provision for every thing he does. *No government could be administered on such principles.* * * * *There are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the Government.*"

These observations are especially and forcibly applicable to the terse but very comprehensive provisions of the Constitution and of the several statutes cited, as to the powers and duties of the President, the Attorney-General and Marshals.

The act of the Attorney-General in directing the United States Marshal to protect the life of Mr. Justice FIELD against the assaults of the deceased and his wife, is, in legal contemplation, the act of the President. The President speaks and acts through the heads of the several executive departments, in relation to subjects which appertain to their respective duties. They are but the subordinates of the President, wielding his power: *Wilcox* v. *Jackson* (1839), 13 Pet. (38 U. S.) 513; *United States* v. *Cutter* (1856), 2 Curt. C. Ct. 617. In the former case, relating to a reservation of land by the Secretary of War, the Court said—

"Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties."

See also 7 Attorney-General's Opinions, 480–1, Id. 433–479; *Confiscation cases* (1873), 20 Wall. (87 U. S.) 108–9; *United States* v. *Eliason* (1842), 16 Pet. (41 U. S.) 291.

By Section 788 Rev. Stat., and the several provisions of the Statutes of California herein cited, the United States Marshal is made a peace officer, and as such he is authorized to preserve the peace, so far as a breach of the peace affects the authority of the United States and obstructs the operations of the Government and its various departments. The Courts must, from the nature of things, be enabled fully to perform all their func-

tions imposed upon them by the Constitution and laws, without hindrance or obstruction, and they must have the inherent power to protect themselves by and through their executive officers, under the direction and supervision of the Attorney-General and the President, against obstruction and hindrance in the performance of their judicial duties. An assault upon a Judge in Court, or a Judge out of Court, while in the performance of his duty, induced by his judicial action, and intended or calculated to obstruct him in, or deter him from, a free and full discharge of his duty, is a breach of the National peace affecting the sovereignty of the Nation, and tending to obstruct *and impair* the operations and efficiency of one of the most important departments of the Government. As such, it is the duty of the United States Marshal, under the police powers of the Nation so conferred upon him, by the statutes cited, and as a National peace officer, to prevent such breach of the peace. Under the State laws, deputy sheriffs, when occasion requires, constables and police officers of cities are assigned to certain districts, to watch over the safety of the citizens and to guard and protect their persons and property from assault, destruction or injury—*in short, to prevent the commission of crimes*, etc. These officers in cities are found everywhere, night and day, guarding the citizen and his property from injury. So, the Attorney-General, under the provisions of the statute cited, and the President under the provisions of the Constitution, requiring him to see that the laws are faithfully executed, are authorized and empowered to direct the assignment by the Marshal, of any deputy, to perform any special National police duty within his jurisdiction, arising out of the statutes, whether by express provision or necessary implication, and under any power, necessarily inherent in the President and Government, in order to give full effect and efficiency to the Government, or any of its departments. It has never, so far as we are advised, been doubted that a Marshal, or Deputy Marshal, is authorized to protect a Judge and preserve order in open Court, even by the use of force, without any special order or command, as a part of the duties necessarily inherent in his office; yet, as we have already seen, there is no more specific statutory authority for so preserving order, and protecting the Judge in Court, than

for performing the same duty, under proper conditions, for a Judge engaged in performing his duties, of whatever nature, out of Court.

It is argued by one of the counsel on behalf of the State that these matters pertain exclusively to the peace of the State, and that the State has not only power to preserve the public peace, but that it is amply capable of performing this service; that it is its duty to do it; that the threats of the deceased were matters of public notoriety; and that by calling the powers of the State into action, Justice FIELD's life might have been protected by the State, and there would have been no necessity whatever for what is called on the part of the State, the illegal action of the United States Marshal. It may be conceded, and it is undoubtedly true, that it was an imperative duty of the State to preserve the public peace, and to amply protect the life of Mr. Justice FIELD, *but it did not do it.* Where would Mr. Justice FIELD have been to-day, had he relied solely upon the State to perform her conceded imperative duty?

Not having performed that obligation while on his journey in discharge of his judicial duties, does a complaint now come with a good grace from the State, against the United States, for performing it for her, as well as for the National Government, by protecting one of its most distinguished judicial functionaries through one of its own officers, in the only manner in which it could have been effectively performed?

In the present case, and on this official journey, there was a necessity for the kind of protection afforded Mr. Justice FIELD, for no other kind would have been adequate. The occasion required a preventive remedy.

The use of the State police force would have been impracticable, as the powers of the sheriff would have ended at the borders of his county, and of other township and city peace officers, at the boundaries of their respective townships and cities. Only a United States Marshal, or his deputy, could exercise these official functions throughout the United States judicial district, and, as we have seen, the powers exercised concern matters affecting the peace of the National Government, and if the National Government has no authority to act in the premises, it certainly ought to have such power.

The only remedy suggested on the part of the State, was to arrest the deceased and hold him to bail to keep the peace under Section 706 of the Penal Code, the highest limit of the amount of bail being $5000. But although the threats are conceded to have been publicly known in the State, no State officer took any means to provide this flimsy safeguard.

Perhaps counsel intended to intimate that it was not the duty of the State, but of Mr. Justice FIELD himself, to set in motion proceedings under the law furnished by the State, to put the decedent under bonds to keep the peace. Has it come to this, then, that a Justice of the Supreme Court of the United States, when in obedience to the behests of the law, he comes to California to perform his judicial duties, must submit to the humiliation of immediately upon his arrival, stealing away to some justice of the peace and instituting proceedings to bind over to keep the peace, vindictive and dangerous litigants who have threatened his life? But what security to Mr. Justice FIELD would a bond of $5000 afford against resolute, violent and desperate parties, for whom the penalties for murder have no deterring power? The United States Marshal, the United States Attorney for the District of California, the Attorney-General of the United States at Washington, and the mass of the people of California, thought that the exigencies of the occasion required something more, and the result fully justified their view of the matter.

Although no adequate means of protection were afforded by the State on his late official journey, and Mr. Justice FIELD would, in all probability, not now be among the living, had not the petitioner, by the wise forethought of the Attorney-General, been detailed to protect his life, yet the fact of the failure of the State to perform its duty does not afford any reason for taking the petitioner out of the custody of the State, unless, in committing the homicide, he was engaged in the performance of "an act done * * * in pursuance of a law of the United States," and the killing was justifiable. The failure to perform its duty would not, alone, oust the jurisdiction of the State, if it be exclusive. But since the possible remedy mentioned under the State law was alluded to by counsel as ample, we refer to it as illustrating the neces-

sity for a speedy amendment of the laws of the United States, if they are now so defective as to afford no protection to the United States Judges in the performance of their high functions.

It is apparent to us, if he is not now so protected, that the distinguished Justice allotted to the Ninth Circuit, and also his associates, should have thrown over them the protecting ægis of the laws of that Government which he has so long, faithfully and efficiently served.

After mature consideration, we have reached the conclusion that the homicide in question was committed by petitioner while acting in the discharge of a duty imposed upon him by the Constitution and laws of the United States, within the meaning of the provisions of Section 753 of the Revised Statutes.

It only remains to inquire, secondly, was the homicide necessary, or was it reasonably apparent to the mind of the petitioner, at the time and under the circumstances then existing, that the killing was necessary in order to a full and complete discharge of such duty?

The answer to this proposition is really included in the answer to the last, but we desire to make some observations bearing especially upon it.

The Attorney-General and counsel for the State declined to discuss the question as to whether the homicide was justifiable, because, in their view, this is a question solely for the State Courts, the case, as claimed by them, not being within the provisions of Section 753 of the Revised Statutes, and, therefore, not within the jurisdiction of this Court. Holding as we do, that the case falls within those provisions, so far as the petitioner was authorized to act by the Constitution and laws of the United States, it becomes necessary to determine whether the homicide was justifiable. For, if it was malicious, wanton or reckless, without any reasonable apparent necessity in order to fully and properly perform his duty of protecting Justice FIELD, then it was an act performed beyond and outside his duty, and he is amenable to the State Courts.

The facts set forth in the petition, and in the traverse to the return of the Sheriff, are fully and satisfactorily proved by the testimony, and whether we determine the case upon demurrer

to the traverse, or upon the whole case, as presented in the record and evidence, the result must be the same.

Were the question of justification to be determined by the laws of the State of California, or in the State Courts, there could be no ground for doubt. Says the Penal Code—

"Homicide is also *justifiable* when committed by any person when resisting any attempt to murder any person, * * * *or to do some great bodily injury upon any person.*" (Sec. 197, Penal Code.)

But we shall consider the question without reference to the statute of California.

It is unnecessary to repeat the facts in full. When the deceased left his seat, some thirty feet distant, walked stealthily down the passage in the rear of Justice FIELD and dealt the unsuspecting jurist two preliminary blows, doubtless by way of reminding him that *the time for vengeance* had at last come, Justice FIELD was already at the traditional "wall" of the law. He was sitting quietly at a table, back to the assailant, eating his breakfast, the side opposite being occupied by other passengers, some of whom were women, similarly engaged. When, in a dazed condition, he awoke to the reality of the situation and saw the stalwart form of the deceased, with arm drawn back for a final mortal blow, there was no time to get under or over the table, had the law, under any circumstances, required such an act for his justification. Neagle could not seek a "wall" to justify his acts, without abandoning his charge to certain death. When, therefore, he sprang to his feet and cried, "Stop! I am an officer," and saw the powerful arm of the deceased, drawn back for the final deadly stroke, instantly change its direction to his left breast, apparently seeking his favorite weapon, the knife, and at the same time heard the half-suppressed disappointed growl of recognition of the man who, with the aid of half a dozen others, had finally succeeded in disarming him of his knife at the court-room a year before, the supreme moment had come, or, at least, with abundant reason, he thought so, and fired the fatal shot. The testimony all concurs in showing this to be the state of facts, and the almost universal consensus of public opinion of the United States seems to justify the act. On that occasion, a second, or two seconds, signified, at least, two valuable lives,

and a reasonable degree of prudence would justify a shot one or two seconds too soon, rather than a fraction of a second too late. Upon our minds the evidence leaves no doubt whatever that the homicide was fully justified by the circumstances.

We have seen in an Eastern law journal, but with its disapproval, some adverse criticism upon the action of the petitioner, attributed to a quarter ordinarily entitled to great consideration and respect. But it is not for scholarly gentlemen of humane and peaceful instincts—gentlemen, who, in all probability, never in their lives, saw a desperate man of stalwart frame and great strength in murderous action—it is not for them sitting securely in their libraries, 3000 miles away, looking backward over the scene, to determine the exact point of time when a man in Neagle's situation should fire at his assailant, in order to be justified by the law. It is not for them to say that the proper time had not yet come. To such, in all probability, the proper time would never come. Neagle on the scene of action, facing the party making a murderous assault, knowing by personal experience his physical powers, and his desperate character; and by general reputation, his life-long habit of carrying arms, his readiness to use them, and his angry, murderous threats, and seeing his demoniac looks, his stealthy assault upon Justice FIELD from behind, and, remembering the sacred trust committed to his charge—Neagle, in these trying circumstances, was the party to determine when the supreme moment for action had come, and if he honestly acted with reasonable judgment and discretion, the law justifies him, even if he erred. But who will have the courage to stand up in the presence of the facts developed by the testimony in this case, and say that he fired the smallest fraction of a second too soon?

In our judgment he acted, under the trying circumstances surrounding him, in good faith and with consummate courage, judgment and discretion. The homicide was, in our opinion, clearly justifiable in law, and in the forum of sound, practical common sense—commendable. This being so, and the act having been "done * * * in pursuance of a law of the United States," as we have already seen, it cannot be an offense against, and he is not amenable to, the laws of the State.

Let the petitioner be discharged.

NOTE.—The report of this case, as published immediately after its delivery, is incorrect, as the third paragraph on page 605 erroneously reads: "The principles of the common law, so far as they are applicable, and as they have been recognized, and as they are in force under the Constitution, not modified or repealed by the National Statutes, and the usages generally long acted upon, are as much a portion of the laws of the United States, as are the Statutes themselves. So, also, where the Statutes point out duties, provide for the accomplishment of many objects, or confer authority in general terms, they carry with them, by implication, all the powers, duties, exemptions, and authority necessary to carry out and accomplish all the purposes and objects intended to be secured thereby."

Note should also be made of the fact that the Grand Jury of the county where the assault upon Justice FIELD occurred, did, after the discharge of Neagle by the United States Court, make a report, finding the shooting of Terry to have been intentional and deliberate, but noting that Neagle had been taken from the power of the State by process of the United States Court, from whose decision the Grand Jury inferred that Neagle could not be tried in any Court.

As this case is likely to be a leading case upon the rights and duties of the officers and courts of the United States, the following annotation is directed chiefly towards a further presentation of the authorities relied upon by the learned Judge.

The opinion embraces two propositions concerning the power of the United States Courts.

1. To inquire, by a *habeas corpus* proceeding, into the detention of any petitioner, and to discharge him from any custody, if he is held in violation of the Constitution of the United States.

2. To decide, in exclusion of the State Courts, whether an act has been done in pursuance of a law of the United States.

Under the second head, the Courts will decide, not only whether the act was done in performance of a right or duty, but also whether it was done in a manner justified by the Constitution and laws of the United States alone.

The logical order of presenting the authorities having been, very naturally, adopted by the learned Judge in his opinion, the chronological order will generally be pursued here, as indicating from one of two political stand-points, the rise or the declaration of this truly august and National power.

The Judiciary Act of 1789 (1 Stat. at L. 82), enacts: § 14. That either of the justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment; *Provided*, That writs of *habeas corpus* shall, in no case, extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

This section is now incorporated into sections 751, 752 and 753, of the Revised Statutes, and in its original form, is manifestly inapplicable to the Neagle case. But the decisions made, down to 1833, in cases where the supervising authority of the United States Courts was established, are the more valuable as laying a broad foundation for the power to coerce any State, or State official, which might interfere with the actions of any officer of the United States. Without seeking to exhaust the decisions *pro* and *con*, the following appear to sufficiently show all that was

said before the supreme authority of the United States Courts in National questions was firmly established.

Chisholm v. *Georgia* (1793), 2 Dall. 419, was the early and great case where one of the United States was held suable by a citizen of another State. Of course such a decision was too much alike for State's Rights men and for State's Immunity men, and the Eleventh Amendment put an end to the collection of debts due and justly owing by a State. It is to be hoped that the time of public honesty may be approaching when this amendment will be so amended as to read that, "The judicial power of the United States shall extend to any suit in law or equity, commenced or prosecuted against the United States, or any one of them, by citizens of the United States, or by citizens or subjects of any foreign State."

The Court was composed of IREDELL, J., who dissented; BLAIR, J., WILSON, J., CUSHING, J., and JAY, C. J., who all agreed in the judgment of the Court. The remarks of the judges on the subject of State sovereignty are worthy of note, though the case was one of a purely civil nature, being an action of *assumpsit*.

The second section of the Third Article of the Constitution provides: "1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects."

Commenting on this section, IREDELL, J. (dissenting), said: "The Constitution is particular in expressing the parties who may be the objects of the jurisdiction in any of these cases, but in respect to the subject matter upon which such jurisdiction is to be exercised, used the word 'controversies' only. The Act of Congress [the Judiciary Act of 1789, § 13,] more particularly mentions civil controversies, a qualification of the general word in the Constitution, which, I do not doubt, every reasonable man will think well warranted, for it cannot be presumed that the general word 'controversies' was intended to include any proceedings that relate to criminal cases, which, in all instances that respect the same government only, are uniformly considered of a local nature, and to be decided by its particular laws:" *Id.* 431–2.

The dissenting opinion proceeds:— "The powers of the General Government, either of a Legislative or Executive nature, or which particularly concern Treaties with Foreign Powers, do, for the most part (if not wholly), affect individuals, and not States: they require no aid from any State authority. This is the great leading distinction between the old Articles of Confederation and the present Constitution. The judicial power is of a peculiar kind. It is, indeed, commensurate with the ordinary Legislative and Executive powers of the General Government, and the power which concerns treaties. But it also goes further. Where certain parties are concerned, although the subject of the controversy does not relate to any of the special objects of authority of the General Government, wherein the separate sovereignties of the States are blended in one common mass of supremacy, yet the General Government has a judicial authority in regard to such subjects of

controversy, and the Legislature of the United States may pass all laws necessary to give such judicial authority its proper effect. So far as the States, under the Constitution, can be made legally liable to this authority, so far, to be sure, they are subordinate to the authority of the United States, and their individual sovereignty is, in this respect, limited. But it is limited no farther than the necessary execution of such authority requires:" *Id.* 435, 436.

BLAIR, J. (one of the majority of the Court), more instructively said: "If sovereignty be an exemption from suit in any other than the sovereign's own Courts, it follows that, when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty:" *Id.* 452.

WILSON, J. (another of the majority of the Court), went further into general and decisive principles: "This is a case of uncommon magnitude. One of the parties to it is a STATE; certainly respectable, claiming to be *sovereign*. The question to be determined is, whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others more important still; and may, perhaps, be ultimately resolved into one no less *radical* than this—do the people of the United States form a NATION? * * * * As a judge of this Court, I know and can decide upon the knowledge, that the citizens of Georgia, when they acted upon the large scale of the *Union*, as a part of the 'People of the United States,' did *not* surrender the supreme, or sovereign power to that State; but, *as to the purposes of the Union*, retained it to themselves. *As to the purposes of the Union*, therefore, Georgia is NOT a sovereign State. * * * Whoever considers, in a combined and comprehensive view, the *general texture* of the Constitution, will be satisfied that the people of the *United States* intended to form themselves into a Nation, *for national purposes*. They instituted, for *such* purposes, a National Government, complete in all its parts, with powers Legislative, Executive and Judiciary; and, in all these powers, extending over the whole Nation. Is it congruous that with regard to *such* purposes, any man, or body of men, any person natural or artificial, should be permitted to claim, successfully, entire exemption from the jurisdiction of the National Government? Would not such claims, crowned with success, be repugnant to our very existence as a Nation?" *Id.* 453, 457, 465.

These observations of Judge WILSON should be compared with those of MCKEAN and the Virginia judges, as well as of the Wisconsin Court, later on in this annotation.

CUSHING, J. (another of the majority of the Court), said: "As to corporations, all States whatever are corporations or bodies politic. The only question is, what are their powers? As to individual States and the *United States*, the Constitution marks the boundary of powers. Whatever power is deposited with the *Union*, by the people, for their own necessary security, is so far a curtailing of the power and prerogatives of States. * * * So that I think, no argument of force can be taken from the sovereignty of States. Where it has been abridged, it was thought necessary for the greater indispensable good of the whole:" *Id.* 468.

JAY, C. J. (the last of the majority of the Court), discussed the question of State sovereignty on the same lines, and summed up the opinions of the Court in a few words: "Sovereignty is the right to govern; a Nation, or State sovereign, is the person or persons in whom

that resides. In *Europe*, the sovereignty is generally ascribed to the *Prince;* here it rests with the people; there, the sovereign actually administers the government; here, never in a single instance; our Governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents in *Europe* stand to their sovereigns. Their *Princes* have *personal* powers, dignities and pre-eminences, our rulers have none but *official;* nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens:" *Id.* 472.

This is noteworthy, as the same sentiments are offered to-day as a palliative to those who magnify State citizenship. The same people, only different forms of government for different purposes; this is the burden of the recent opinions mentioned in this annotation.

As to the general canon of construction, the Chief Justice proceeded to consider that, among the six objects embraced in the design of the Constitution, the second was, *To establish justice.* "It may be asked, what is the precise sense and latitude in which the words to *establish justice*, as here used, are to be understood? The answer to this question will result from the provisions made in the Constitution on this head. They are specified in the second section of the Third Article, where is ordained, that the judicial power of the *United States* shall extend to ten descriptions of cases. * * * This extension of power is *remedial*, because it is to settle controversies. It is, therefore, to be construed liberally. * * * When power is thus extended to a *controversy*, it necessarily, as to all judicial purposes, is also extended to those between whom it subsists:" *Id.* 476.

Comm. v. *Cobbett* (1798), 3 Dall. (Pa.) 467, was a case where the State Court refused to allow the removal to the United States Circuit Court, by an alien, of a suit against him. The ground taken by the Pennsylvania Court was that the Supreme Court of the United States had the sole jurisdiction over civil suits to which a State was a party, and that this was a criminal suit, and not a civil suit. The remarks of Chief Justice McKean, which were afterwards quoted by the Virginia Supreme Court of Appeals (*infra*, page 629), would undoubtedly be characterized, at this day, as *dicta*, as he said, "Previous to the delivery of my opinion in a cause of such importance as to the consequences of the decision, I will make a few preliminary observations on the Constitution and laws of the United States of America:" *Id.* 473. As a part of the "preliminary observations," so heartily approved by the Virginia Judge, the following words were used: "The Government of the United States forms a part of the government of each State; its jurisdiction extends to the providing for the common defence against exterior injuries and violence, the regulation of commerce and other matters specially numerated in the Constitution; all other powers remain in the individual States, comprehending the interior and other concerns; these combined form one complete government. Should there be any defect in this form of government, or any collision occur, it cannot be remedied by the sole act of the Congress, or of a State; the people must be resorted to, for enlargement or modification. If a State should differ with the United States about the construction of them, there is no common umpire but the people, who should adjust the affair by making amendments in the constitutional way, or suffer from the defect. In such a case, the Constitution of the United States is federal; it is a league or treaty, made by the individual States, as one party, and all the States, as another party. * * * There is no

provision in the Constitution, that in such case, the judges of the Supreme Court of the United States shall control and be conclusive; neither can the Congress, by a law, confer that power:" *Id.* 473, 474.

The United States v. *Hudson & Goodwin* (1812), 7 Cranch (11 U. S.) 32, was a case certified from a Circuit Court of the United States, upon a division of opinion, whether the Circuit Court had common law jurisdiction in cases of libel. The Supreme Court, composed of MARSHALL, C. J., and WASHINGTON (*absent*), JOHNSON, LIVINGSTON, TODD, DUVALL and STORY, J. J., held that all exercise of criminal jurisdiction in common law cases was not within the implied powers of the courts of the United States: *Id.* 34. The opinion of the majority of the Court was delivered by JOHNSON, J., who said: "The powers of the General Government are made up of concessions from the several States; whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of these concessions; that power is to be exercised by courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the Courts which the United States may, under their general powers, constitute, one only—the Supreme Court—possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it:" *Id.* 33.

Martin v. *Hunter's Lessee* (1816), 1 Wheat. (14 U. S.) 304, was a writ of error from the Court of Appeals of Virginia, founded upon the refusal of a State Court, for the first time (*Id.* 342), to obey the mandate of the Supreme Court of the United States, granted in 1813, in the same case (*sub nom. Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch (11 U. S.) 603), where the State Court had denied a right under the treaty of 1794, with Great Britain. The jurisdiction of the United States Court thus became the point in issue. The Virginia Court had answered the mandate of the Supreme Court of the United States, by entry of judgment, "that the appellate power of the Supreme Court of the United States does not extend to this Court * * * [and] that the proceedings [on the previous writ of error], in the Supreme Court, were *coram non judice*, in relation to this Court:" a proposition not denied by the Supreme Court, if the premises had been sound: *Elliott* v. *Piersol* (1828), 1 Peters (26 U. S.) 328, 340. Speaking of the third article of the Constitution which creates and defines the judicial power of the United States, STORY, J., said: "It is a part of the very same instrument which was to act, not merely upon individuals, but upon States; and to deprive them altogether of the exercise of some powers of sovereignty, and to restrain and regulate them in the exercise of others:" *Id.* 328.

This language is important, for JOHNSON, J., in a separate opinion, said: "It will be observed in this case, that the Court disavows all intention to decide on the right to issue compulsory process to the State Courts." He then goes on to use the words quoted above (page 601), in immediate connection with his alarm over the asserted power of every State Court to decide whether the United States Supreme Court had exceeded its powers. The unanimous opinion of the Court was against any such power. The Court was again composed of MARSHALL, C. J., WASHINGTON, JOHNSON, LIVINGSTON, TODD, DUVALL and STORY, J. J.

A curious feature of the *dicta* contained in this concurring opinion will be apparent from a quotation: "Sup-

pose a foreign minister, or an officer acting regularly under authority from the United States, seized to day, tried to-morrow, and hurried the next day to execution. Such cases may occur, and have occurred in other countries. The angry, vindictive passions of men have too often made their way into judicial tribunals, and we cannot hope forever to escape their baleful influence. In the case supposed, there ought to be a power somewhere, to restrain, or punish, or the Union must be dissolved. At present, the uncontrollable exercise of criminal jurisdiction is most securely confided to the State tribunals. The courts of the United States are vested with no power to scrutinize into the proceedings of the State courts in criminal cases; * * * and extreme, indeed, I flatter myself, must be the case in which the General Government could ever be induced to assert this right. If ever such a case should occur, it will be time enough to decide upon their constitutional power to do so:" *Id.* 377.

The case in the Supreme Court of Appeals of Virginia is reported in 4 Munf. 1 (April, 1814), and the judges gave separate opinions. CABELL, J., said: "The Constitution of the United States contemplates the independence of both governments, and regards the *residuary* sovereignty of the States as not less inviolable than the *delegated* sovereignty of the United States. It must have been foreseen that controversies would sometimes arise as to the boundaries of the two jurisdictions. Yet the Constitution has provided no umpire, has erected no tribunal, by which they shall be settled:" *Id.* 9. Again, "what that Constitution is, what those laws and treaties are, must, in cases coming before the State courts, be decided by the State judges, *according to their own judgments, and upon their own responsibility.* To the opinions of the Federal Courts they may always pay the respect which is due to the opinions of other learned and upright judges; * * * but it is *respect* only, and not the acknowledgment of *conclusive authority*:" *Id.* 11. That is, "the powers vested by the Constitution, in the Congress of the United States, were delegated for purposes essential to the general welfare, and ought not to be defeated or impaired; and I have no doubt that one of these powers is that of making all laws, necessary and proper, for extending the judicial power of the United States, to *all* the cases, to which the Constitution declares that that power shall extend. I must not, however, be understood as impeaching the concurrent jurisdiction, *original* and *final*, of the State courts, *provided the parties shall elect their jurisdiction*:" *Id.* 15.

BROOKE, J., said: "The oath to support the constitution, with a strong responsibility to those from whom all power is derived, seem to be the only sanctions against the exercise of power not given by the people. That oath, which is prescribed by the sixth article, imposes no subordination upon those to whom it is administered: it is common to all who exercise power under either [State or Federal] government:" *Id.* 24.

ROANE, J., also based his concurring opinion upon the case in the Supreme Court of Pennsylvania: *Comm.* v. *Cobbett* (1798), 3 Dall. (Pa.) 467, *supra*. The Judge said: "One of the appellee's counsel was pleased to call this decision a *dictum* of Chief Justice MCKEAN'S. I must be excused for saying it is no *dictum*, nor is it the sole and undivided opinion of that respected judge. It is the solemn and unanimous decision and resolution of the Supreme Court of one of the most respected States in the Union. * * * * I consider this decision by the Supreme Court of Pennsylvania, as a complete and solemn authority, to show, that in case of a differ-

ence of opinion between the two governments [State and Federal], as to the extent of the powers vested by the Constitution, while neither party is competent to bind the other, the courts of each have power to act upon the subject:" *Id.* 53.

The effect of uniformity of decision, by the United States Judges, was also felt from the beginning, and the earliest contrary thought was this: "The counsel for the appellee have furnished us with a string of cases in which the jurisdiction in question has been entertained by the Supreme Court of the United States. They have had it in their power to do this, because the cases occurred in *that* court, and not in this; because the man, and not the lion, was the painter (See Æsop's Fables):" ROANE, J., *Hunter* v. *Martin* (1814), 4 Munf. (Va.) 51.

After such sentiments, the clear and decisive language of Chief Justice TANEY, in *Abelman* v. *Booth* (1858), 21 How. (62 U. S.) 506, 522, ought to be carefully read and reflected upon, as the sentiment of one well nigh devoid of political principles inimical to State sovereignty; especially if MARSHALL and STORY should be thought too strong in their Nationalism.

Cohens v. *Virginia* (1821), 6 Wheat. (19 U. S.) 264, came next. It was "a writ of error to the judgment of the Court of Hustings for the borough of Norfolk, on an information for selling lottery tickets, contrary to an Act of the Legislature of Virginia." An Act of Congress, authorizing the lottery, was held invalid in Virginia, and an appeal to a higher State Court denied; this writ was then taken directly to the Supreme Court of the United States. On a motion made in the latter Court to dismiss the writ, three points were argued—

First. That the State was a defendant.

Second. That no writ of error to the State Court could be prosecuted.

Third. That neither the Constitution nor the laws of the United States had been violated. This point was finally sustained by the Court after a hearing on the merits, and does not fall within the scope of the present annotation.

MARSHALL, C. J., said—"The questions presented to the Court by the two first points made at the bar, are of great magnitude, and may truly be said vitally to affect the Union. They exclude the inquiry whether the Constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the Government to apply a corrective. They maintain that the Nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the Government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the Constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the Nation; but that this power may be exercised, in the last resort, by the courts of every State of the Union. That the Constitution, laws, and treaties, may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision, without permitting inquiry, affirms that the decision he asks does not depend on inquiry:" *Id.* 377. And these are seen to be the sentiments of the Virginia Judges, page 629, *supra.*

Discussing, then, the first question, the Chief Justice proceeded—"A case in law or equity, consists of the right of

one party, as well as of the other, and may truly be said to arise under the Constitution, or a law of the United States, whenever its correct decision depends on the construction of either. * * With the ample powers confided to this Supreme Government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the States, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are, in themselves, limitations of the sovereignty of the States; but, in addition to these, the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power, to maintain the principles established in the Constitution. The maintenance of these principles in their purity, is certainly among the great duties of Government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the Constitution, or laws, of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be a party. * * * We think a case arising under the Constitution, or laws, of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case:" *Id.* 379, 382–3.

It should be observed that this was twenty-four years after the adoption of the Eleventh Amendment, which was declared adopted January 8th, 1798.

The Chief Justice proceeded, substantially, to review the sentiments of the Virginia Judges, quoted above, and put them aside with these words—"But a Constitution is framed for ages to come, and is designed to approach immortality, as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, so far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No Government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed, and it is reasonable to expect that a Government should repose on its own Courts, rather than on others. There is certainly nothing in the circumstances under which our Constitution was formed, nothing in the history of the times, which would justify the opinion that the confidence reposed in the States was so implicit as to leave them, and their tribunals, the power of resisting, or defeating, in the form of law, the legitimate measures of the Union. The requisitions of Congress, under the Confederation, were as constitutionally obligatory as the laws enacted by the present Congress. That they were habitually disregarded, is a fact of universal notoriety. * * * The people made the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will. But this supreme and irresistible power to make, or to unmake, resides only in the whole body of the people, not in any sub-division of them. The attempt of any of the parts to exercise it, is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it:" *Id.* 387–8, 389.

These last words are the foundation for the Force Bill of 1833, *infra*.

Coming closer to the Neagle case, the Chief Justice noticed the argument

that "cases between a State and one of its own citizens, do not come within the general scope of the Constitution:" *Id.* 390. And this was the answer to that argument—"If jurisdiction depended entirely on the character of the parties, and was not given where the parties have not an original right to come into Court, that part of the second section of the Third Article, which extends the judicial power to all cases arising under the Constitution and laws of the United States, would be mere surplusage. It is to give jurisdiction, where the character of the parties would not give it, that this very important part of the clause was inserted:" *Id.* 391.

Another definition of a case, which falls with the supervising powers of the Supreme Court, is given at the close of that portion of the opinion which treats of the power which is appellate, and not original, though a State is a party, as in a criminal case. "The article does not extend the judicial power to every violation of the Constitution which may possibly take place, but 'to a case in law or equity,' in which a right, under such law, is asserted in a court of justice. If the question cannot be brought into a Court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a Court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend:" *Id.* 405.

Coming next to the question, whether the Eleventh Amendment prevents the examination of a conviction in the State Criminal Court, the amendment was first cited literally—

XI. "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced, or prosecuted, against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State."

Then, after a discussion of the nature of a suit and a writ of error, the conclusion reached was—"If this writ of error be a suit in the sense of the Eleventh Amendment, it is not a suit commenced or prosecuted 'by a citizen of another State, or by a citizen or subject of any foreign State.' It is not, then, within the amendment, but is governed entirely by the Constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the Constitution, or laws, of the United States, without respect to parties:" *Id.* 412. Just before, the Chief Justice had expressed his opinion that "If a suit, brought in one Court, and carried by legal process to a supervising court, be a continuation of the same suit, then this suit is not commenced, or prosecuted, against a State. It is clearly, in its commencement, the suit of a State against an individual, which suit is transferred to this Court, not for the purpose of asserting any claim against the State, but for the purpose of asserting a Constitutional defense against a claim, made by a State:" *Id.* 409.

The decision then passed to the affirmation of the judgment in *Martin* v. *Hunter's Lessee* (*supra*, page 628), and after reviewing the objections advanced by the Virginia judges, and also considering the nature of the Union, and citing, as contemporary exposition, *The Federalist*, and the Judiciary Act of 1789, the Chief Justice reached this conclusion—"Dismissing the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist can ever influence a State or its courts, the necessity of uniformity, as well as correctness in expounding the Constitution and laws of

the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved. We are not restrained, then, by the political relations between the General and State Governments, from construing the words of the Constitution, defining the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import. * * * The American people may certainly give to a national tribunal a supervising power over those judgments of the State courts, which may conflict with the Constitution, law, or treaties of the United States, without converting them into Federal courts, or converting the National into a State tribunal. The one Court still derives its authority from the State, the other still derives its authority from the Nation. * * * 'A complete consolidation of the States, so far as respects the judicial power,' would authorize the Legislature to confer on the Federal courts appellate jurisdiction from the State courts, in all cases whatsoever. The distinction between such a power, and that of giving appellate jurisdiction in a few specified cases, in the decision of which the Nation takes an interest, is too obvious not to be perceived by all. * * * The question, then, must depend on the words themselves; and on their construction, we shall be the more readily excused for not adding to the observations already made, because the subject was fully discussed and exhausted in the case of *Martin* v. *Hunter*:" *Id.* 416, 422, 423.

This decision, in *Cohens* v. *Virginia*, was unanimous, the Court being composed of MARSHALL, C. J., and JOHNSON, LIVINGSTON, TODD, DUVALL, and STORY, J. J. WASHINGTON, J., was absent.

The power of the United States courts and judges to declare and enforce a final determination of the meaning and application of the National laws, being thus settled, we may now pass to the question of the power to release officers and persons in the custody of the State authorities.

The general question of the right to issue writs of *habeas corpus* was discussed in such cases as *U. S.* v. *Hamilton* (1795), 3 Dall. (3 U. S.) 17; *Ex parte Bollman* (1807), 4 Cranch (8 U. S.) 75; *Ex parte Watkins* (1830), 3 Pet. (28 U. S.) 193; *Ex parte Milligan* (1866), 4 Wall. (71 U. S.) 2. But this annotation is necessarily confined to cases where the National powers have been exerted over persons detained by the States, and the general principles must be assumed, or merely alluded to in connection with the precise subject.

As the courts of the United States are of limited jurisdiction and also dependent upon Acts of Congress for the right to exercise the judicial powers conferred by the Constitution of the United States (*U. S.* v. *Hudson* (1812), 7 Cranch (11 U. S.) 32; *Ex parte Bollman*, *supra*; *Tennessee* v. *Davis*, *infra*), the statutes from the time of the celebrated Force Bill of 1833 will be cited in full, in their proper order of time. But, first, it will be well to examine one more case.

In *Osborn* v. *The Bank* (1824), 9 Wheat. (22 U. S.) 739, the jurisdiction of the United States Circuit Court, in suits by the Bank, was upheld, because given by a valid law of the United States, MARSHALL, C. J., saying: "The Constitution establishes the Supreme Court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive; and then defines that which is appellate, but does not insinuate that in any such case, the power cannot be exercised in its original form by courts of original jurisdiction. It is not insinuated that the judicial power, in cases depending on the character of the cause, cannot be exercised

in the first instance, in the courts of the Union, but must first be exercised in the tribunals of the State; tribunals over which the Government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States. We perceive, then, no ground on which the proposition can be maintained, that Congress is incapable of giving the Circuit Courts original jurisdiction, in any case to which the appellate jurisdiction extends. We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title, or right, set up by the party, may be defeated by one construction of the Constitution, or law, of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the Constitution, but to those parts of cases only which present the particular question involving the construction of the Constitution, or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it, shall disable Congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the Constitution, laws, or treaties of the United States, a trial in the Federal courts will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will. We think, then, that when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact, or of law, may be involved in it:" *Id.* 821–3.

All the other Judges, except JOHNSON, J. (who dissented), agreed with the Chief Justice. They were WASHINGTON, TODD, DUVALL, STORY, and THOMPSON, J. J.

JOHNSON, J., in the course of dissenting opinion, said: "Efforts have been made to fix the precise sense of the Constitution, when it vests jurisdiction in the General Government, in 'cases arising under the laws of the United States.' To me the question appears susceptible of a very simple solution; that all depends upon the identity of the case supposed; according to which idea, a case may be such in its very existence, or it may become such in its progress. An action may 'live, move, and have its being,' in a law of the United States; such is that given for the violation of a patent right, * * * And of the other description [those], * * * in which the pleadings, or evidence, raised the question on the law, or Constitution, of the United States. In this class of cases, the occurrence of a question makes the case and transfers it, as provided for under the twenty-fifth sec-

tion of the Judiciary Act, to the jurisdiction of the United States. * * * As to cases of the first description, *ex necessitate rei*, the courts of the United States must be susceptible of original jurisdiction; and, as to all other cases, I should hold them, also, susceptible of original jurisdiction, if it were practicable, in the nature of things, to make out the definition of the case, so as to bring it under the Constitution, judicially, upon an original suit. But, until the plaintiff can control the defendant in his pleadings, I see no practical mode of determining when the case does occur, otherwise than by permitting the cause to advance until the case, for which the Constitution provides, shall actually arise:" *Id.* 887–9.

The Force Bill of March 2, 1833 (4 Stat. at L. 632), is entitled "An Act further to provide for the collection of duties on imports," and enacts, § 7—That either of the Justices of the Supreme Court, or a Judge of any District Court of the United States, in addition to the authority already conferred by law [§ 14 of the Judiciary Act, *supra*, page 624], shall have power to grant writs of *habeas corpus* in all cases of a prisoner, or prisoners, in jail, or confinement, when he, or they, shall be committed, or confined on, or by, any authority, or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof, anything in any Act of Congress to the contrary notwithstanding. And if any person, or persons, to whom such writ of *habeas corpus* may be directed, shall refuse to obey the same, or shall neglect, or refuse, to make return, or shall make a false return thereto, in addition to the remedies already given by law, he, or they, shall be deemed and taken to be guilty of a misdemeanor, and shall, on conviction before any court of competent jurisdiction, be punished by fine not exceeding one thousand dollars, and by imprisonment not exceeding six months, or by either, according to the nature and aggravation of the case.

This section is incorporated into sections 753 and 643, of the Revised Statutes; no cases grew out of it at the time (see 1 Von Holst, Const. Hist. 459, sqq.), and it remained for use in protecting United States Marshals in fugitive slave cases, as mentioned below.

The importance of the peculiar wording of this section will be further apparent when there is considered the refusal of the Circuit Court for Pennsylvania and New Jersey, to release the Secretary of the Spanish Legation, by a writ of *habeas corpus*, from confinement by the State authorities, for forgery: *Ex parte Cabrera* (1805), 1 Wash. C. C. 232. WASHINGTON, J., said, while speaking of the Fourteenth Section of the Judiciary Act: "I am one of those, I confess, who have always thought it would have been better if the Legislature of the Union, in allotting to the several courts the jurisdiction they were to exercise, had occupied the whole ground marked out by the Constitution; but I am not one of those who think it a commendable quality in a Judge to enlarge, by construction, the sphere of his jurisdiction: that of the Federal Courts is of a limited nature, and cannot be extended beyond the grant:" *Id.* 237. And the Secretary was left to the mercies of the State and his action or criminal remedy, as he might be advised.

The Act of August 29, 1842 (5 Stat. at L. 539), came next, and, though not closely connected with the Neagle case, is worthy of note, for its distinct advance at so late a day. Its immediate cause, however, was the Treaty of 1842 with Great Britain.

It is entitled "An Act to provide further remedial justice in the courts of the United States;" and enacts—"That

either of the Justices of the Supreme Court of the United States, or Judge of any District Court of the United States, in which a prisoner is confined, in addition to the authority already conferred by law [§ 14 of the Judiciary Act], shall have power to grant writs of *habeas corpus* in all cases of any prisoner, or prisoners, in jail or confinement, where he, she, or they, being subjects or citizens of a foreign State, and domiciled therein, shall be committed, or confined, or in custody, under or by any authority or law, or process founded thereon, of the United States, or of any one of them, for or on account of any act done, or omitted, under any alleged right, title, authority, privilege, protection, or exemption, set up, or claimed, under the commission, or order, or sanction, of any foreign State, or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof. And upon the return of the said writ, and due proof of the service of notice of the said proceeding, to the Attorney-General, or other officer, prosecuting the pleas of the State, under whose authority the prisoner has been arrested, committed, or is held in custody, to be prescribed by the said Justice, or Judge, at the time of granting said writ, the said Justice, or Judge, shall proceed to hear the said cause; and if, upon hearing the same, it shall appear that the prisoner, or prisoners, is, or are, entitled to be discharged from such confinement, commitment, custody, or arrest, for, or by reason of, such alleged right, title, authority, privilege, protection, or exemption, so set up and claimed, and the laws of nations applicable thereto, and that the same exists in fact, and has been duly proved to the said Justice, or Judge, then it shall be the duty of the said Justice, or Judge, forthwith to discharge such prisoner, or prisoners, accordingly. And if it shall appear to the said Justice, or Judge, that such judgment, or discharge, ought not to be rendered, then the said prisoner, or prisoners, shall be forthwith remanded: *Provided always*, that from any decision of such Justice, or Judge, an appeal may be taken to the Circuit Court of the United States, for the District in which the said cause is heard; and from the judgment of the said Circuit Court, to the Supreme Court of the United States, on such terms, and under such regulations and orders, as well as for the custody and appearance of the prisoner, or prisoners, as for sending up to the appellate tribunal a transcript of the petition, writ of *habeas corpus* returned thereto, and other proceedings, as the Judge hearing the said cause may prescribe; and pending such proceedings, or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against the said prisoner, or prisoners, in any State Court, or by, or under the authority of any State, for any matter, or thing, so heard and determined, or in process of being heard and determined, under and by virtue of such writ of *habeas corpus*, shall be deemed null and void.

This statute is incorporated in sections 751, 752, 753, 762, 763, 764, 765 and 766 of the Revised Statutes of the United States.

Ex parte Dorr (1845), 3 How. (44 U. S.) 104, was a motion by the counsel for Dorr, for a writ of *habeas corpus*. McLEAN, J., stated the case thus: "Thomas W. Dorr was convicted, before the Supreme Court of Rhode Island, at March Term, 1844, of treason against the State of Rhode Island, and sentenced to the State prison for life. And it appears from the affidavits of Francis C. Treadwell, a counsellor-at-law of this Court, and others, that access to Dorr in his confinement, to ascertain whether he desires a writ of error, to remove the record of his conviction to this Court,

has been refused. On this ground the above application has been made. Have the Court power to issue a writ of *habeas corpus* in this case? * * In the trial of Dorr it was insisted that the law of the State, under which he was prosecuted, was repugnant to the Constitution of the United States. And on this ground a writ of error is desired, under the twenty-fifth section of the Judiciary Act above named. That, as the prayer of this writ can only be made by Dorr, or by some one under his authority, and as access to him in prison is denied, it is insisted that the writ to bring him before the Court is the only means through which this Court can exercise jurisdiction in his case by a writ of error. Even if this were admitted, yet the question recurs whether this Court has power to issue the writ to bring him before it. That it has no such power under the common law is clear, and it is equally clear that the power nowhere exists, unless it be found in the fourteenth section above cited. [*Supra*, page 624.] * * The words of the proviso are unambiguous. They admit of but one construction. And that they qualify and restrict the preceding provisions of the section, is indisputable. [So held by MARSHALL, C. J., *Ex parte Bollman* (1807), 4 Cranch (8 U. S.) 75, 99.] Neither this, nor any other Court of the United States, or Judge thereof, can issue a *habeas corpus*, to bring up a prisoner, who is in custody, under a sentence, or execution, of a State Court, for any other purpose than to be used as a witness. And it is immaterial whether the imprisonment be under civil or criminal process. As the law now stands, an individual, who may be indicted in a Circuit Court for treason against the United States, is beyond the power of Federal Courts and Judges, if he be in custody under the authority of a State:" *Id.* 104, 105. The Court was unanimous, being composed of TANEY, C. J., and STORY, MCLEAN, WAYNE, CATRON, MCKINLEY, DANIEL and NELSON, J.J.

TREAT, J. (*In re McDonald* (1861), 9 AMER. LAW REG., (O. S.) 661, 672), while sitting in the District Court for the District of Missouri, explains why *Dorr's* case was so decided: "That proviso [to the Fourteenth Section of the Judiciary Act] was for the express purpose of preventing conflicts between Federal and State authority—of confining the United States Courts and Judges within their appropriate spheres."

Ex parte Jenkins (1853), U. S. Circ. Ct., E. Dist. Pa., 2 Wall., Jr. 521: S. C. 2 AMER. LAW REG. (O. S.), 144. The first case was a *habeas corpus* issued to bring up the bodies of certain United States Deputy Marshals who had been arrested under a charge of assault and battery, while seeking to arrest a fugitive slave in Luzerne County, Pennsylvania. (A full statement of the facts of this and the following cases, is given in 3 AMER. LAW REG. (O. S.), 208 sqq.) The State of Pennsylvania did not make any appearance or opposition on the return of the writ, and the Court refused to hear David Paul Brown, Esq., who nominally appeared for the constable, but in reality for certain abolitionist societies. Mr. Brown had been heard, as *Amicus Curiæ*, on the presentation of the petition for the writ, and pointed out that the *Habeas Corpus* section of the Judiciary Act of 1789 (§ 14) did not authorize the issuing of the writ in this case. GRIER, J., said: "But this writ was not allowed and issued under the general law, but, as the District Attorney of the United States has stated, under special powers conferred by the Act of Congress of 2d March, 1833. * * * * * This Act was passed when (Ch. 57, § 7) a certain State of this Union [South Carolina] had threatened to nullify Acts of Congress, and to treat those as criminals who should attempt

to execute them; and it was intended as a remedy against such State legislation. * * * The extreme advocate of State rights would scarcely contend that, in such cases, the Courts of the United States should be wholly unable to protect themselves or their officers:" *Id.* 527, 529. A discharge was ordered.

Ex parte Jenkins (*vide supra*): The second case was a *habeas corpus* to bring up the bodies of the same Deputy Marshals, who had been arrested on a *capias* for the same assault, at the suit of the fugitive slave, and committed for want of bail. KANE, J., said: "He who has read the Act of Congress of March 2d, 1833, or who remembers the times, to meet which it was passed, knows perfectly well that it looked to the contingency of a collision between the general and the State authorities. There were statesman then who imagined it possible that a statute of the United States might be so obnoxious in a particular region, or to a particular State, as that the local functionaries would refuse to obey it, and would interfere with the officers who were charged to give it force, even by arresting and imprisoning them. In direct antecedence, therefore, to the section under consideration, they framed two other [temporary] sections of the same statute, one authorizing the military forces of the United States to be employed in aid of the judicial power; the other authorizing a resort to special jails for the safe-keeping of United States prisoners. It was necessary to go one step further. The military power might enforce the execution of the laws, when the Marshal had failed and been made a prisoner himself for attempting to execute them; the prisons specially constituted might detain those whom the military had arrested; but the officer of the law, arrested in the discharge of his duty, imprisoned for the offence of attempting to discharge it, perhaps at the suit of the resisting State, more probably at the instance of some private grief, what was to become of him? This seventh section meets the case and gives the remedy:" *Id.* 535. A discharge was ordered. (s. c. 3 AMER. LAW REGISTER (O. S.), 227.)

Ex parte Jenkins (*vide supra*): The third case was a *habeas corpus* to bring up the bodies of the same Deputy Marshals, who had been arrested under a bench warrant from the Court of Quarter Sessions of Luzerne County, based on an indictment charging them with riot, assault and battery, and assault with attempt to kill. The circumstances of all three cases were the same. KANE, J., again discharged the Marshals, saying: "* * * The rule which has been referred to, as obtaining so generally in the cases of concurrent jurisdiction, that the Court which first asserts jurisdiction, shall retain it to the end, does not apply. That is a rule of comity, founded on the general convenience, seeking to avert a conflict of action between two sets of courts. It assumes that the jurisdictions are concurrent, and the controversies the same. But in cases like that before me, either the subjects of controversy in the two courts are not the same, but the proceedings involve differing questions of law or fact; or invoke different modes of relief or censure; or else, all these being the same in the two courts, it was the object and purpose of the Act of Congress to make the jurisdiction of the Federal Court revisory, and its action controlling, for the very reason that, otherwise, such a conflict might exist between the two. On the first of these suppositions, there has been no prior assertion of jurisdiction by the tribunal of the State; on the other, the relation of the Federal to the State Courts is adversary rather than concurrent. In a word, then, as I read the section, it is my duty to hear and determine, not-

withstanding the proceedings that have been had before a State Court, just so far as may bear upon the question of the relator's right to a discharge under the laws of the United States. But no further:" *Id.* 542.

U. S. ex rel v. *Morris* (1854), 2 AM. LAW REG. (O. S.) 348, in the District Court for Wisconsin, was very similar to the preceding cases, and the Deputy Marshal was discharged.

Thomas v. *Crossin* (1854), 3 AM. LAW REG. (O. S.) 207, is the hearing, in the Supreme Court of Pennsylvania, of a motion for an attachment against the Sheriff for failure to bring in the bodies of the Deputy Marshals, discharged by the United States Court, as mentioned above, page 638. After reviewing the nullification proceedings of South Carolina, the seventh section of the Force Bill was construed only to relate to acts done in pursuance of "an *avowed purpose*, by some authority or law of a State, to disregard an act of Congress, and to imprison, or otherwise punish, the officers of the United States, and their assistants, for enforcing it, and operates only in cases where this purpose *appears on the face of the proceedings*:" *Id.* 216. The italics are those of Judge Lewis, and some additional extracts from his opinion are necessary for the understanding of such a narrow construction of this perpetual section of the Force Bill. The learned Judge alluded to the provisions of the Act of 1842 (*supra*) and then said: "But no such provisions are contained in the Act of 1833. No authority is given to 'hear the cause,' nor to receive proofs, apart from the cause of detainer returned. The difference between the two acts, and the diversity in the several occasions which produced them, plainly show that Congress intended that the powers granted by, and the mode of action under them, should also be different. In the one case, the Judges were confined to the cause of detainer returned, for the reason that this was all that was required to accomplish the object of the act. In the other, they were authorized to go behind the return, and to inquire into the facts and merits of the justification relied on; for nothing short of this would effectuate the manifest intention of the law, or meet the mischief designed to be remedied:" *Id.* 217–8.

Without anticipating too much, the language of TREAT, J. (*In re McDonald* (1861), 9 AMER. LAW REG. (O. S.) 662), while sitting in the District Court for Missouri, may be quoted: "Suffice it to say, that in each instance when the Federal Courts have been compelled to act under the law of 1833, so far as is known, they have not failed to exercise and enforce their authority, in cases similar to those just mentioned. Judge MCLEAN and Judge GRIER, of the Supreme Court, have given elaborate, convincing and sound decisions upon that subject; the correctness of which, Judges LEAVITT, KANE and MILLER, of the District Courts, have not hesitated to put into practical application, despite local excitement, prejudices and resistance:" *Id.* 684.

Ex parte Robinson (1855), 6 McLean 355, was a petition for a *Habeas Corpus*, by the United States Marshal for the District of Ohio, stating his imprisonment by a State Judge for the performance of his duty in connection with the Fugitive Slave Law. MCLEAN (Associate Justice of the Supreme Court of the United States) released the Marshal, of course, and as the State Judge had relied upon the reasoning of the Wisconsin cases (3 Wis. 1 and 157), decided in 1854 and reversed by the United States Supreme Court in 1858: (*infra* p. 640) the learned Judge went on to say:—"It is a general principle of law, to which I know of no exception, that the laws of every Government shall be construed by itself; and such

construction is acted upon by the judiciary of all other countries. By the Federal Constitution [Art. III. Sec. 1] the judicial power of the United States is declared to be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Under this provision, the judiciary of the Union gives a construction to the laws, which is obligatory on the State tribunals * * * * State rights are invoked by the counsel. If these rights are construed to mean a subversion of the Federal authorities, they may be somewhat in danger. * * A sense of duty compels me to say, that the proceedings of the honorable Judge were not only without the authority of law, but against law, and that the proceedings are void, and I am bound to treat them as a nullity." *Id.* 362, 364–5.

Ex parte Robinson (1856), 1 Bond 39, was a similar petition by the same Marshal of the same District, who had been imprisoned by a State Court for contempt, in not producing the fugitive slaves. The Marshal claimed the protection of the Act of 1833, and LEAVITT, U. S. Dist. J., said: "It is insisted by the counsel who oppose the discharge of the Marshal, that this provision of the Act of Congress applies only to the case of a Federal officer who is confined, or imprisoned, by State authority, under an unconstitutional State law, and reference is made to the historical fact that the Act of 1833 was passed to meet the then existing exigency, growing out of the threatened opposition of one of the States of the Union to the national legislation for the imposition and collection of duties on imports. To this it may be replied that whatever may have been the peculiar circumstances under which the Act passed, the section above quoted is still in full force, and obligatory as a law of the United States. And it may be fairly inferred that while its purpose was, at the date of its passage, to provide against a great danger then pending, it has been deemed expedient that it should be continued, as a remedy against nullification in any form in which it might be presented:" *Id.* 43. The Marshal was discharged, with a reiterated disclaimer of jurisdiction to review or reverse the action of the State Judge, the jurisdiction exercised being solely under this statutory provision: *Id.* 49, 50.

Abelman v. *Booth* (1858), 21 How. (62 U. S.) 506, arose under the Fugitive Slave Law of 1850, Abelman having arrested Booth, under a proper warrant, for aiding and abetting the escape of a fugitive slave. Booth sued out a *habeas corpus* from the State Court, and in the language of TANEY, C. J. (writing a year after his Dred Scott decision), "a judge of the Supreme Court of the State of Wisconsin, in the first of these cases, claimed and exercised the right to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner, who had been committed by the commissioner, for an offense against the laws of this Government, and that this exercise of power by the judge was afterwards sanctioned and affirmed by the Supreme Court of the State. And it further appears, that the State court have not only claimed and exercised this jurisdiction, but have also determined that their decision is final and conclusive upon all the courts of the United States, and ordered their clerk to disregard and refuse obedience to the writ of error issued by this Court pursuant to the Act of Congress of 1789, to bring here for examination and revision, the judgment of the State court. These propositions are new in the jurisprudence of the United States, as well as of the States; and the supremacy of the State courts over the courts of the United States, in cases arising under the

Constitution and laws of the United States, is now, for the first time, asserted and acted upon in the Supreme Court of a State:" *Id.* 513, 514. This last remark is manifestly incorrect. See *Martin* v. *Hunter*, *supra*, a case not cited in this opinion, nor in the brief of Attorney General Jeremiah S. Black.

The issue thus tendered to the United States Supreme Court was met as decidedly by TANEY, as earlier by MARSHALL, for he pointed out that "The Constitution was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home; for, if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty, which the States then possessed, should be ceded to the General Government; and that, in the sphere of action assigned it, it should be supreme and strong enough to execute its own laws, by its own tribunals, without interruption from a State, or from State authorities. And it was evident that anything short of this would be inadequate to the main objects for which the Government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution, peacefully, by its judicial tribunals." *Id.* 517.

Apparently, with attention towards the difficulty which arose in *Martin* v. *Hunter*, *supra*, Chief Justice TANEY continued: "The appellate power, it will be observed, is conferred on this Court in all cases or suits in which such a question shall arise. It is not confined to suits in the inferior courts of the United States, but extends to all cases where such a question arises, whether it be in a judicial tribunal of a State, or of the United States. And it is manifest that this ultimate appellate power, in a tribunal created by the Constitution itself, was deemed essential to secure the independence and supremacy of the General Government, in the sphere of action assigned to it; to make the Constitution and laws of the United States uniform and the same in every State; and to guard against evils which would inevitably arise from conflicting opinions between the courts of a state and of the United States, if there was no common arbiter, authorized to decide between them. * * * * And, as the courts of a State, and the courts of the United States might, and indeed, certainly would often differ as to the extent of the powers conferred by the General Government, it was manifest that serious controversies would arise between the authorities of the United States and of the States, which must be settled by force of arms, unless some tribunal was created to decide between them, finally and without appeal. * * * * Now, it certainly can be no humiliation to the citizen of the Republic, to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign State, to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a State of this Union. On the contrary, the highest honor of sovereignty is untarnished faith. And cer-

tainly no faith could be more deliberately and solemnly pledged, than that which every State has plighted to the other States, to support the Constitution as it is, in all its provisions, until they shall be altered in the manner in which the Constitution itself prescribes. In the emphatic language of the pledge required, it is to support this Constitution. And no power is more clearly conferred by the Constitution and laws of the United States, than the power of this Court, to decide, ultimately and finally, all cases arising under such Constitution and laws; and for that purpose, to bring here for revision, by writ of error, the judgment of a State court, where such questions have arisen, and the right claimed under them, denied by the highest judicial tribunal in the State." *Id.* 518, 519, 525.

When the Remittiturs from the United States Supreme Court reached the Supreme Court of Wisconsin, DIXON, C. J., delivered an extended opinion (*Ableman* v. *Booth* [1859], 11 Wis. 517), assenting to the doctrine of Chief Justice TANEY, and citing 1 Calhoun's Works, 321, 328, 259; *Martin* v. *Hunter*, and *Cohens* v. *Virginia*, *supra*; 1 Kent's Com. 349; *Piqua Bank* v. *Knoup* (1856), 6 Ohio St. 342; and in a note, among others, *Ferris* v. *Coover* (1858), 11 Cal. 175, in which TERRY, C. J. (the dead man in the principal case), denied the constitutionality of the Judiciary Act and the claim of jurisdiction under it, as above mentioned, saying that "it has never been admitted in Virginia, has always been repudiated by Georgia, and has lately been questioned in several other States. The decisions of the United States Supreme Court on this question embody the political principles of a party which has passed away. The reasoning by which it is attempted to sustain them, is based upon rules of construction now universally regarded as unwarranted by the letter, or spirit, of the Constitution, and directly opposed to those adopted by the same tribunal in the late case of *Dred Scott* v. *Sanford* (1856), 19 How. (60 U. S.) 393, and in the more recent case [of *People's Ferry Co.* v. *Beers* (1857)] in 20 How. (61 U. S.) 393, in which the admiralty jurisdiction of State Courts is admitted, notwithstanding the Ninth Section of the Judiciary Act. The force and authority of the opinions of the Supreme Court of the United States, upon the question of jurisdiction, as well as all others of a political nature, is much weakened by the consideration that the political sentiments of the Judges in such cases necessarily gave direction to the decisions of the Court. The Legislative and Executive power of the Government had passed, or was rapidly passing, into the hands of men entertaining opposite principles. Regarding the Judicial as the conservative department, believing the possession by the General Government of greater powers than those expressly granted by the Constitution to be absolutely necessary to its stability, they sought, by a latitudinarian construction of its provisions, to remedy the defects in that instrument, and by a course of judicial decisions, to give direction to the future policy of the Union. In order to accomplish this end, the Court almost invariably upheld every assumption of power by the General Government (however at variance with the limitations of the Constitution), including the alien and sedition law, the embargo act, the charter of the United States Bank, and a retrospective bankrupt law; the constitutionality of which acts is supported by the same course of reasoning, and the same *liberal* construction of the *implied* powers of Congress, as is applied to the Judiciary Act of 1789. All the arguments adduced in favor of the claim of jurisdiction on the part of the Federal Court, are answered, and the unconstitutionality of

the Twenty-fifth Section of the Judiciary Act, to my mind, conclusively established, by the able opinions in *Hunter* v. *Martin*, 4 Mun. (*supra*); *Padelford* v. *Mayor and Aldermen of Savannah* (1853), 14 Ga. 438; *Johnson* v. *Gordon* (1854), 4 Cal. 368; and the very elaborate [dissenting] opinion of Mr. Chief Justice BARTLEY, in the case of the *Piqua Bank* v. *The Treasurer of Miami County* (1856), 6 Ohio St. 342, in which all the authorities are collated:" *Id.* 183-4. [But, *contra*, pages 644 and 645.]

This was not very gracious, as the same Judge had been released from the custody of the San Francisco Vigilance Committee to allow him to try a case in his own Court, by virtue of a *habeas corpus* issued out of the United States Circuit Court, under the Fourteenth Section of the Judiciary Act: *Ex parte Des Rochers* (1856), 1 McAllister 68.

The Booth cases were considered as of ruling authority for the point, that a State Court had no jurisdiction to issue a writ of *habeas corpus* when the party was imprisoned by the draft commissioner, a ministerial officer, for disobedience in not reporting after being drafted: *In re Spangler* (1863), 11 Mich. 298; S. C. 2 AMER. LAW REG. (N. S.) 598. But DILLON, J., endeavored to exclude imprisonment by a ministerial officer: *Ex parte Anderson* (1864), 16 Iowa 595, though "there is no solid distinction between the two classes" of imprisonment by ministerial officers and under the judgment of a judicial tribunal: PAINE, J., *In re Tarble* (1870), 25 Wisc. 396. And such is the opinion of the Supreme Court of the United States, *infra*, page 644.

When a similar question came again before the Supreme Court of Wisconsin, PAINE, J. (who had been counsel for Booth, see 11 Wis. 499), defended the original judgment of that Court in this wise—"When this Court, in the *Booth case*, assumed the power, in the exercise of its ordinary jurisdiction, to issue the writ of *habeas corpus*, to pass collaterally upon the jurisdiction of the District Court of the United States, to pronounce the judgment under which Booth was imprisoned, it was not assuming any such unwarrantable or unheard of power, as it has been charged with doing; and that, on the contrary, whatever might be said as to the correctness of its decision, still, in exercising the right to decide the question, it was proceeding upon a principle universally recognized, and exercising a right that is, and must, of necessity, be exercised by all courts. For there is no just reasoning upon which any distinction can be asserted between a *habeas corpus* and any other judicial proceeding, or suit, in respect to the right of the Court to decide upon the validity of the judgment of any other court that may be drawn in question. * * * A judgment in a civil suit disposes of the title to property. A judgment in a criminal suit disposes of the prisoner's right to liberty. A civil suit, involving the title to that property, is the appropriate proceeding in which the jurisdiction of the Court to render the one judgment may be drawn into question collaterally. A proceeding by *habeas corpus*, may appropriately have the same effect as to the other:" *In re Tarble* (1870), 25 Wis. 399, 401.

This defence is manifestly available, if needed, for the United States Courts, when the circumstances are reversed.

The real defence of the Wisconsin Court was expressed, later in their opinion in the same *Tarble* case, thus—"That which was really unusual and extraordinary was, not that it [the Wisconsin Court, in the *Booth* case], assumed the power to decide upon the question, but that, in exercising that power, it decided against the validity of

a law passed to sustain the institution of slavery. The public and judicial mind of the country was then in such a peculiar state upon that question, that it was doubtless this fact, together with the subsequent denial, by this Court, of the appellate jurisdiction, which was, in truth, contrary to the entire current of authority, that so shocked the nerves of the venerable members of the Supreme Court, that they failed to perceive distinctly the real theory upon which this Court had assumed the right to pass collaterally upon the validity of a judgment even of a Federal Court: PAINE, J., 25 Wis. 407.

U. S. v. *Tarble* (1871), 13 Wall. (80 U. S.) 397, was a writ of error to the Supreme Court of Wisconsin, who had discharged a deserter from the regular army from the custody of the United States military authorities, on the ground that he was a minor. The judgment of the State Court was reversed in an opinion by FIELD, J., on the ground that the State Court had no right to issue the writ. NELSON, GRIER, CLIFFORD, SWAYNE, MILLER, DAVIS, BRADLEY and STRONG, J. J., concurred. CHASE, C. J., dissented.

The *Booth* case (*supra*, p. 640,) was followed, and the decision therein was said to dispose "alike of the claim of jurisdiction by a State court, or by a State judge, to interfere with the authority of the United States, whether that authority be exercised by a Federal officer or be exercised by a Federal tribunal:" *Id.* 403–4.

Continuing, FIELD, J., said: "It is in the consideration of this distinct and independent character of the Government of the United States, from that of the government of the several States, that the solution of the question presented in this case, and in similar cases, must be found. There are, within the territorial limits of each State, two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers, with the action of the other. The two governments, in each State, stand in their respective spheres of action, in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States, when any conflict arises between the two governments. * * * * Whenever, therefore, any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the National Government must have supremacy, until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. This temporary supremacy, until judicial decision by the National tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments. * * * Some attempt has been made in adjudications, to which our attention has been called, to limit the decision of this Court [in the *Booth* cases] to cases where a prisoner is held in custody, under undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority. But it is evident that the decision does not admit of any such limitation. * * * * All that is meant by the language used, is, that the State judge, or State court, should proceed no further, when it appears, from the application of the party, or the return

made, that the prisoner is held by an officer of the United States; that is, an authority, the validity of which is to be determined by the Constitution and laws of the United States. If a party thus held, be illegally imprisoned, it is for the courts, or judicial officers of the United States, and those courts or officers alone, to grant him release:" *Id.* 406, 407, 410, 411.

The Wisconsin Court had said—"If there were no appellate jurisdiction, the argument of convenience, in favor of the position that all questions as to the legality of imprisonment, under alleged Federal authority, should be decided exclusively by Federal tribunals, would be very strong. It would then have been held that the judicial power of the United States, over all cases 'arising under the Constitution and laws,' was exclusive. But that appellate jurisdiction over the State Courts, exists. It was provided for by an Act of Congress, at the very outset of the Government. It has been steadily asserted, and exercised, by the Federal Court; and, though denied in a few instances [*vide*, *supra*, pages 627, 629 and 643], by the State Courts, may now be said to be universally acquiesced in:" PAINE, J., 25 Wis. 403. COLE, J., concurred, but DIXON, C. J., dissented on the ground afterwards taken by the Supreme Court of the United States, *supra*, that, in cases of this nature, the jurisdiction of the United States Courts is exclusive.

In all such cases in the State Courts, the jurisdiction of the inferior courts of the United States is not apparently regarded as affording much safety to the liberty of transgressors of the laws of the United States. For, curiously enough, the cases where the State courts attempted to exercise jurisdiction do not seem to be founded upon any inconvenience in applying to the United States Courts. In fact, "from the beginning of the Government, down to the decision of the Supreme Court of the United States in 1858, in the [fugitive slave] cases of *Ableman* v. *Booth* and *U. S.* v. *Booth* (*supra*, page 640), I suppose the very decided preponderance of authority in the State Courts sustains the jurisdiction of those courts, to discharge upon *habeas corpus*, prisoners who, in their judgment, are illegally held, though held under the authority of the United States. * * * * Since that decision the weight of authority, even in the State Courts, is against the jurisdiction. * * * * The current of opinions in the courts of the United States is, so far as I know, absolutely unbroken, except by a single opinion, recently rendered by the learned District Judge for the Northern District of New York, in the matter of William Reynolds, on *habeas corpus*:" BALLARD, J., *In re Farrand* (1867), 1 Abbott 140, 144.

Returning now to the course of decision after *Abelman* v. *Booth*, nothing appears until after the extinction of slavery.

The Act of February 5th, 1867 (14 Stat. at L. 385), is "An Act to amend" the Judiciary Act, and provides—"That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty, in violation of the Constitution, or of any treaty, or law, of the United States; and it shall be lawful for such person so restrained of his, or her, liberty, to apply to either of said justices, or judges, for a writ of *habeas corpus*, which application shall be in writing, and verified by affidavit, and shall set forth the facts concerning the detention of the party applying, in whose custody he, or she, is detained, and by virtue of what

claim, or authority, if known; and the said justice, or judge, to whom such application shall be made, shall forthwith award a writ of *habeas corpus*, unless it shall appear from the petition itself, that the party is not deprived of his, or her, liberty, in contravention of the Constitution, or laws, of the United States. * * * "

This statute is incorporated in sections 751, 752, 753, 763 and 765, and the appropriate portions are literally reenacted in sections 754, 755, 756, 757, 758, 759, 760, 761 and 766. (*Vide*, *supra*, page 597.)

Ex parte McCardle (1867), 6 Wall. (73 U. S.) 318, was a case where a *habeas corpus* had been issued by the United States Circuit Court for the District of Mississippi, to bring in the body of McCardle, who had been arrested by the military authorities of the United States, under the Reconstruction Acts of Congress. The prisoner was remanded, and from the order remanding him to the military authorities, he appealed to the Supreme Court of the United States, and in this form the case was heard on a motion to dismiss for want of jurisdiction; but the Court sustained the jurisdiction. The citation from the opinion of CHASE, C. J. (*supra* p. 592), was made in connection with the construction of the statutory right of appeal given originally "in a small class of cases, arising from commitments for acts done or omitted under alleged authority of foreign governments, by the Act of August 29, 1842 (5 Stat. at L. 539), which authorized a direct appeal from any judgment, upon *habeas corpus*, of a justice of this court, or judge of a district court, to the Circuit Court of the proper District, and from the judgment of the Circuit Court to this Court. This provision for appeal was transferred, with some modification, from the Act of 1842 to the Act of 1867; and the first question we are to consider, upon the construction of that Act, is whether this right of appeal extends to all cases of *habeas corpus*, or only to a particular class:" *Id.* 325. And the Court held the Act to extend to all appeals.

"Subsequently the case was argued very thoroughly and ably upon the merits, and was taken under advisement. While it was thus held, and before conference in regard to the decision proper to be made, an Act was passed by Congress (Act, March 27, 1868, 15 Stat. at L. 44), returned, with objections by the President, and re-passed by the constitutional majority, which it is insisted, takes from this Court jurisdiction of the appeal:" CHASE, C. J. *Ex parte McCardle* (1868), 7 Wall. (74 U. S.) 506. The Court held that "the Act of 1868 does not except from that jurisdiction any cases but appeals from circuit courts under the Act of 1867. It does not affect the jurisdiction which was previously exercised:" *Id.* 515, citing the previous decision in this case, 6 Wall. (73 U. S.) 324. This repealing Act was omitted from the Revised Statutes, § 764. To the same effect: *Ex parte Yerger* (1869), 8 Wall. (75 U. S.) 85.

U. S. ex rel. Roberts v. *The Jailer*, (1867) 2 Abbott 265, was a hearing upon *habeas corpus* of a special bailiff of a marshal, who had been fired upon by a person whom he sought to arrest and had returned the fire with fatal effect. The State officials arrested and indicted the bailiff and the United States Circuit Court [for Kentucky, where the death occurred] granted a discharge under the Seventh Section of the Force Bill. The Commonwealth's attorney for the county where the shooting occurred, was notified and argued against the discharge; to which the Court answered, on the general subject of jurisdiction,—"By a long course of judicial decisions, it may now be considered as settled that this act gives relief to one in State custody, not only

when he is held under a law of the State which seeks expressly to punish him for executing a law or process of the United States, but also when he is in such custody under a general law of the State which applies to all persons equally, where it appears he is *justified* for the act done, because it was done in pursuance of a law of the United States, or of a process of a Court or Judge of the same. * * * The decisions in the courts of the United States are absolutely uniform on this subject, and I find no opposing opinions of any court, except a single one rendered by the Supreme Court of Pennsylvania (*Thomas* v. *Crossin*, *supra*, page 639). But surely it cannot be expected that I should attach much importance to, much less follow, a single decision of a State Court, opposed as it is to numerous decisions of the Courts of the United States, some of them rendered by Justices of the Supreme Court. * * * I disclaim all right and power to discharge the relator on any such ground as that the proof shows he acted in *self-defence*. * * * I have only to inquire whether what he did, was done in pursuance of a law and process of the United States, and so *justified*, *not excused*, by that law and process. * * * I can discharge only the officer who relies on the law and process of the United States, as his sole authority and complete justification:" *Id.* 277.

But the same Judge, in *U. S. ex rel. Weeden* (1877), 2 Flip. 76, said: "In writing the opinion, in the case of *Roberts*, *supra*, I was inclined to think that a Federal officer was not entitled to claim his discharge, by simply showing that he had done nothing, except what he was justified in doing by process, but that he was obliged to show that he was justified by his process in doing the very thing imputed to him, and for which he was in confinement. I am constrained, in deference to authority, to modify what that opinion indicates would be my action, when it appears that the officer is actually innocent of the crime imputed, and was faithful in doing all that he really did: *Ex parte Jenkins*, 2 Wall. 537 (*supra*)."

At this point, the case of *U. S.* v. *Doss et al.* (1872), 11 AMER. LAW REG. (N. S.) 320, came to trial in the District Court for the Western District of Missouri. Samuel Snow, a defendant, had been arrested under a warrant issued by a Commissioner of the United States, upon a charge of having in his possession, with the intention of passing as genuine, certain counterfeit obligations of the United States. He was bailed, but afterwards surrendered and committed to jail. McAfee, another defendant, then, as Probate Judge of the county, issued a writ of *habeas corpus*, upon a petition suppressing the facts, which, however, were made known to the State Judge by the return made by the United States Marshal. Snow was discharged by McAfee, and they, with Snow's attorney and another person, were indicted, under the Act of Congress (Rev. Stat., §§ 5398, 5401, for knowingly and wilfully obstructing the United States Marshal, and for rescuing Snow. The jury found the Judge and the attorney guilty, and acquitted the other defendants. There was no such violence as marked the case of *Ex parte Sifford* (1857), 5 AMER. LAW REG. (O. S.) 659, because that was a fugitive slave case, but the latter case will serve to indicate the necessity of such convictions, if the process of the United States Courts is to be executed.

Ex parte Bridges (1875), 2 Woods 428, was a hearing on *habeas corpus* of Bridges, who had been convicted, in the Superior Court of Randolph County, Georgia, of perjury before an United States Commissioner. BRADLEY (Associate Justice of the Supreme Court) re-

leased the relator, saying that "although it may appear unseemly that a prisoner, after conviction in a State Court, should be set at liberty by a single Judge on *habeas corpus*, there seems to be no escape from the law. If it were a case in which the State Courts had jurisdiction of the offense, the general rule of the common law would intervene, and require that the prisoner should be remanded, and left to his writ of error. In such a case, although the judgment were erroneous, the imprisonment would not be in violation of the Constitution, or laws, of the United States. The judgment might be wrong, but the imprisonment under it would be right, until the judgment was reversed:" *Id.* 432. (The relator was discharged, but immediately rearrested upon a bench warrant from the United States Court in Savannah.)

The learned Judge in the last case called attention to the Act of 1842 (*supra*, page 635), as extending the provisions of the Force Bill to foreigners, for the prevention of the complications growing out of the Canada rebellion and the action of the State of New York.

Ex parte Siebold (1879), 100 U. S. 371, was a case where certain Judges of Election had been convicted in the United States Circuit Court for the District of Maryland, under Sections 5515 and 5522, Rev. Stat. U. S. They presented petitions for *habeas corpus*, and the jurisdiction of the United States Supreme Court was sustained, as appellate and not original, though no writ of error could be brought. The discharge was asked for on the ground of the unconstitutionality of these sections, but the Court thought otherwise and refused the discharge.

The argument of the Virginia Court of Appeals, in 1814 (*supra*, p. 629,) was thus answered by BRADLEY, J., though it does not appear that the case was even mentioned: "The more general reason assigned; to-wit, that the nature of sovereignty is such as to preclude the joint co-operation of sovereigns, even in a matter in which they are mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and harmonious action on the part of the National and State governments, in the election of Representatives. It is, at most, an agreement *ab inconvenienti*. There is nothing in the Constitution to forbid such co-operation in this case. On the contrary, as already said, we think it clear that the clause of the Constitution, relating to the regulation of such elections, contemplates such co operation whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the State. If the two governments had entire equality of jurisdiction, there might be an intrinsic difficulty in such co-operation. Then, the adoption by the State government, of a system of regulations, might exclude the action of Congress. By first taking jurisdiction of the subject, the State would require exclusive jurisdiction in virtue of a well-known principle, applicable to courts having co-ordinate jurisdiction over the same matter. But no such equality exists in the present case. The power of Congress, as we have seen, is paramount, and may be exercised at any time, and to any extent, which it deems expedient; and, so far as it is exercised, and no further, the regulations effected supersede those of the State, which are inconsistent therewith:" *Id.* 391, 392. The quotations on pages 593 and 599, *supra*, follow at a little interval. Then the same learned Judge proceeds: "This concurrent jurisdiction, which the National Government necessarily possesses, to exercise its powers of sovereignty in all parts of the United States, is distinct from that exclusive power, which, by the first article of the Constitution, it is authorized to exercise over

the District of Columbia, and over those places within a State, which are purchased by consent of the Legislature thereof, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. There, its jurisdiction is absolutely exclusive of that of the State, unless, as is sometimes stipulated, power is given to the latter, to serve the ordinary process of its courts in the precinct acquired. Without the concurrent sovereignty referred to, the National Government would be nothing but an advisory government. Its executive power would be absolutely nullified:" *Id.* 395. And then follow the quotations on pages 606 and 600, *supra*. And the opinion closes with these words: "The doctrine laid down at the close of counsels' brief, that the State and National Governments are co-ordinate and altogether equal, on which their whole argument, indeed, is based, is only partially true. The true doctrine, as we conceive, is this, that whilst the States are really sovereign as to all matters which have not been granted to the jurisdiction and control of the United States, the Constitution and Constitutional laws of the latter are, as we have already said, the supreme law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation. This is the fundamental principle on which the authority of the Constitution is based; and unless it be conceded in practice, as well as in theory, the fabric of our institutions, as it was contemplated by its founders, cannot stand. The questions involved have respect, not more to the autonomy and existence of the States, than to the continued existence of the United States as a government to which every American citizen may look for security and protection in every part of the land:" *Id.* 398, 399.

The Court was composed of WAITE, C. J., and CLIFFORD, SWAYNE, MILLER, FIELD, STRONG, BRADLEY, HUNT, and HARLAN, J. J. FIELD, J., filed a dissenting opinion, in which CLIFFORD, J., concurred. But, in the course of that dissent, the learned Judge was careful to say: "It was the purpose of the framers of the Constitution to create a government which could enforce its own laws, through its own officers and tribunals, without reliance upon those of the States, and thus avoid the principal defect of the Government of the Confederation: and they fully accomplished their purpose:" *Id.* 413. And, with somewhat peculiar inaptness to the present tragic incident, the same learned Judge says: "It is true that, since the recent amendments of the Constitution, there has been legislation by Congress, asserting, as in the instance before us [of regulating Congressional Elections], a direct control over State officers which previously was never supposed to be compatible with the independent existence of the States in their reserved powers. * * * They give to the Federal Government the power to strip the States of the right to vindicate their authority in their own courts, against a violator of their laws, when the transgressor happens to be an officer of the United States, or alleges that he is denied, or cannot enforce, some right under their laws. * * * In my judgment, and I say it without intending any disrespect to my associates, no such advance has ever before been made toward the conversion of our Federal system into a consolidated and centralized government:" *Id.* 413, 414.

Tennessee v. *Davis* (1879), 100 U. S. 257, is probably the most interesting of all the citations in the principal case. Davis had been indicted in the State Court for murder, and, before trial, was permitted to remove the proceedings to the United States Circuit Court, on the ground that he had not committed murder at all, but that he had acted in self

defence, while in performance of his duty as United States Deputy Collector of Internal Revenue. This was in accordance with Section 643, Rev. Stat. U. S. The State made a motion to remand, but was denied. The opinion was written by STRONG, J., and WAITE, C. J., and SWAYNE, MILLER, BRADLEY, HUNT and HARLAN, J.J., concurred. CLIFFORD and FIELD, J.J., dissented.

In delivering the opinion of the Court, STRONG, J., said: "We come, then, to the inquiry most discussed during the argument, whether Section 643 is a constitutional exercise of the power vested in Congress. Has the Constitution conferred upon Congress the power to authorize the removal from a State Court to a Federal Court, of an indictment against a revenue officer, for an alleged crime against the State, and to order its removal before trial, when it appears that a Federal question, or a claim to a Federal right, is raised in the case, and must be decided therein?" *Id.* 262. Then follows the quotation, *supra*, page 601. The answer was in the affirmative.

Commenting on the judicial power of the Nation, as declared by the Second Section of the Third Article of the Constitution, the same Judge said: "This provision embraces alike civil and criminal cases arising under the Constitution and laws: *Cohens* v. *Virginia* (1821), 6 Wheat. (19 U. S.) 399. Both are equally within the domain of the judicial powers of the United States, and there is nothing in the grant to justify an assertion that whatever power may be exerted over a civil case, may not be exerted as fully over a criminal one. And a case arising under the Constitution and laws of the United States may as well arise in a criminal prosecution as in a civil suit [*vide supra*, page 629]. What constitutes a case thus arising was early defined in the case cited from 6 Wheaton [*Cohens* v. *Virginia*: *vide supra*, pages 630, 632, 633]:" *Id.* 264.

In effect, answering the sentiments early advanced (*supra*, pages 627, 629), the same Judge said: "If, whenever and wherever a case arises under the Constitution and laws, or treaties, of the United States, the National Government cannot take control of it, whether it be civil or criminal, in any stage of its progress, its judicial power is at least temporarily silenced, instead of being at all times supreme. * * Indeed, the powers of the General Government and the lawfulness of authority exercised, or claimed under it, are quite as frequently in question in criminal cases in State Courts as they are in civil cases, in proportion to their number. * * * * Before the adoption of the Constitution, each State had complete and exclusive authority to administer, by its courts, all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise. But when the Constitution was adopted, a portion of that judicial power became vested in the new Government created, and so far as thus vested, it was withdrawn from the sovereignty of the State. Now, the execution and enforcement of the laws of the United States, and the judicial determination of questions arising under them, are confided to another sovereign, and to that extent the sovereignty of the State is restricted:" *Id.* 266, 267.

FIELD and CLIFFORD, J. J., dissented, the latter advancing the same objection raised in the principal case (*supra*, page 598)—"Neither the Constitution, nor the Acts of Congress, give a revenue officer, or any other officer of the United States, an immunity to commit murder in a State, or prohibit the State from executing its laws for the punishment of the offender. Unquestionable jurisdiction to try and punish offenders against the authority of the United States is conferred upon the Circuit and District Courts; but the Acts

of Congress give those Courts no jurisdiction whatever of offences committed against the authority of a State. Criminal homicide, committed in a State, is an offense against the authority of the State, unless it was committed in a place within the exclusive jurisdiction of the United States. * * * When correctly understood, it is clear that the second case [*Cohens* v. *Virginia*, *supra*, page 630], cannot have any tendency whatever to support the proposition that an indictment for wilful and felonious murder, with malice aforethought, pending in the State Court, and found by a Grand Jury of the State under a statute of the State, not involving any Federal question, may be removed from the State Court into the Circuit Court, for trial, merely because the prisoner, at the time he committed the homicide, was a Deputy Collector of internal revenue. Such a proposition, unsupported by any respectable judicial authority, is only calculated to excite amazement, as the case cited is a direct and conclusive authority the other way, showing to a demonstration, that the Federal Courts cannot exercise any jurisdiction whatever in a criminal case properly pending in a State Court, unless it involves some question arising under the first clause of the second section of the article describing the judicial power conferred by the Constitution: 2 Story, Const., §§ 1721, 1740; 1 Kent, Com. 12th ed., 299; Sergeant, Const. 59; Curtis, Com., § 9; Pomeroy, Const., 2nd ed., § 760:" *Id.* 281, 289.

After the death of Justice CLIFFORD, and when the Court was composed of WAITE, C. J., and MILLER, FIELD, BRADLEY, HARLAN, WOODS, MATTHEWS, GRAY and BLATCHFORD, J. J., the principle upon which the last case was decided was affirmed in an opinion by MATTHEWS, J.: *Davis* v. *South Carolina* (1882), 107 U. S. 597.

In the previous month of May, *Ramsey* v. *The Jailer* (1879), 2 Flip. 457, came before the United States District Court for Kentucky. A deputy United States Marshal had killed a citizen of Kentucky, while in the discharge of his duty, and the State authorities had arrested the Marshal. The United States District Court issued a *habeas corpus*, and, after hearing, discharged the Marshal. The State Court then issued a bench warrant and the United States Court again released the Marshal. Again the State Court took advantage of the Marshal being in that Court and ordered him into custody. Again the United States Court released the Marshal, and insisted that their decision should be respected, following the fugitive slave cases, *supra*, page 637. The learned judge (BALLARD, J.), stated—"I think, although this question has not been very directly passed upon by the Supreme Court of the United States, it is plainly touched upon in the case of *Coleman* v. *Tennessee* (1878), 97 U. S. 509. There a party, a soldier of the United States, during the war, killed a citizen of Tennessee, and the charge was murder. The Judge of the United States Court issued his writ of *habeas corpus*, and discharged him. He was subsequently tried in the State Court, and among the defenses made, was the defense that he had been discharged by the United States Court; and there was another defense, that for anything done by him, during the war, he was not amenable to the State of Tennessee. Now, the case in the Supreme Court went off chiefly on the latter point, but they also stated, substantially, that the judgment of the United States Court, discharging the prisoner, was a defense:" *Id.* 453-4. The opinion of the United States Supreme Court was delivered by FIELD, J., (CLIFFORD, J., dissenting,) and upon this precise point, *Ex parte Yerger* (*supra*, page 646,) was cited as authority

Robb v. *Connolly* (1884), 111 U. S. 624, was a case where the agent of the State of Oregon had been adjudged in contempt by a California Court, upon being served with a *habeas corpus*, for not producing a fugitive whom he had arrested in California by virtue of a warrant of the Governor of California, issued on the requisition of the Governor of Oregon. The agent claimed to be acting under the authority of the United States, but the Supreme Court of the United States held that he was not an officer appointed by, and owing a duty to, the United States; and so the *Booth* and *Tarble* cases were distinguished. HARLAN, J., in delivering the opinion, called attention to the fact that the question had never before been determined in the Supreme Court of the United States, and added: "Underlying the entire argument in behalf of the plaintiff in error is the idea that the judicial tribunals of the States are excluded altogether from the consideration and determination of questions involving an authority, or a right, privilege, or immunity, derived from the Constitution and laws of the United States. But this view is not sustained by the statutes defining and regulating the jurisdiction of the Courts of the United States. * * * * So that a State Court of original jurisdiction, having the parties before it, may, consistently with existing Federal legislation, determine cases at law, or in equity, arising under the Constitution, or laws of the United States, or involving rights dependent upon such Constitution or laws. Upon the State Courts, equally with the Courts of the Union, rests the obligation to guard, enforce and protect every right, granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit, or proceeding, before them. * * * * It is proper to say that we have not overlooked the recent opinion of the learned Judge of the Circuit Court of the United States for the District of California [SAWYER, J.], in *In re Robb* (1884), 19 Fed. Repr. 26. But we have not been able to reach the conclusion announced by him:" [that the agent of the State of Oregon was *pro hoc vice*, an officer of the United State]: *Id.* 635, 637, 639.

Later, in *Ex parte Royal* (1885), 117 U. S. 241, the principle of this decision was said to be sound, as having been held upon full consideration; but, it was also said by the same learned Justice, "it is clear that if the local statute, under which Royal was indicted, be repugnant to the Constitution, the prosecution against him has nothing upon which to rest, and the entire proceeding against him is a nullity:" *Id.* 248. The case raised the question whether the United States Circuit Court had "jurisdiction, on *habeas corpus*, to discharge from custody one who is restrained of his liberty in violation of the National Constitution, but who, at the time, is held under State process for trial, on an indictment charging him with an offense against the laws of the State: (*Id.* 245), in selling coupons without a license. The jurisdiction was sustained upon the authority of *Ex parte Yarbrough* (1883), 110 U. S. 654; *Ableman* v. *Booth*; *Ex parte Siebold*; *Tarble's case*, and *Robb* v. *Connelly*, *supra*. "That the petitioner is held under the authority of a State, cannot affect the question of the power, or jurisdiction, of the Circuit Court, to inquire into the cause of the commitment, and to discharge him, if he be restrained of his liberty in violation of the Constitution. The grand jurors who found the indictment, the Court into which it was returned, and by whose officer he was arrested, and the officer who holds him in custody, are all, equally with individual citizens, under a duty, from the discharge of which the

State could not release them, to respect and obey the supreme law of the land, anything in the Constitution and laws, of any State, to the contrary notwithstanding:'" *Id.* 249. The time when the United States Courts should act, was held also to be in their discretion, so that forbearance towards the State Courts might be exercised, even if it put the accused to a writ of error from the highest Court of the State; and *Ex parte Bridges, supra*, page 647, was quoted with approval. In the same term, this same principle of forbearance was followed in *Ex parte Fonda* (1885), 117 U. S. 516, and was applied in *Ex parte Hanson* (1886), 28 Fed. Repr. 127.

The principles laid down in the preceding cases were made the basis for the decisions upon the jurisdiction of the United States Courts, in interpreting the United States laws: *N. O., etc., R. R. Co.* v. *Miss.* (1880), 102 U. S. 135; *U. S.* v. *Lee* (1882), 106 *Id.* 196; *Covell* v. *Heyman* (1883), 111 *Id.* 176; *Starin* v. *N. Y.* (1885), 115 *Id.* 248; *Ex parte Hanson* (1886), 28 Fed. Repr. 127; *In re Ah Jow* (1886), 29 *Id.* 181; *Findley* v. *Satterfield* (1877), 3 Woods (U. S. Circ. Ct. Rep.) 504, where there are some interesting historical remarks on the Force Bill and the Act of 1842; in removal cases upon criminal charges: *Ex parte Turner* (1879), *Id.* 603; *Georgia* v. *O'Grady* (1876), *Id.* 496; *State* v. *Port* (1880), 3 Fed. Repr. 117; *Georgia* v. *Bolton* (1882), 11 *Id.* 217; in cases arising from enlistment of minors in the Army of the United States: *In re Farrand* (1867), 1 Abb. (U. S.) 140; *In re Neill* (1871), 8 Blatchf. 156; in extradition cases: *In re Bull* (1877), 4 Dillon 323; *In re Wildenhus* (1886), 28 Fed. Repr. 924 (affirmed the same year, 120 U. S. 11); *U. S.* v. *Rauscher* (1886), 119 U. S. 407; *In re Reinitz* (1889), 39 Fed. Repr. 204; in election cases: *Ex parte Turner* (1879), 3 Woods (U. S.) 603; *Ex parte Geissler* (1880), 4 Fed. Repr. 188; *Electoral College of South Carolina*, 1 Hughes (1876), 571; in the execution of a replevin, issued from the United States Court: *Ex parte Thompson* (1876), 1 Flippin 507.

Note should here be made that, for want of space, this annotation does not include any late cases of release of citizens and foreigners, held under the operation of void State laws, or judgments of State Courts: *e.g.*, *In re Loney* (1889), 38 Fed. Repr. 101, affirming *Ex parte Bridges, supra*, page 647. (S. C. *sub nom. Brown* v. *U. S., ex rel. Bridges*, 14 AMER. LAW REG. 566, where a fuller statement of the facts is given, together with the opinion of ERSKINE, J.)

So, too, the question of the executive power which directed the Deputy Marshal to accompany Justice FIELD, is too wide to be appended to a discussion of the chosen point in the decision of the principal case. And the same is true of the cognate question of the powers of United States Marshals and their deputies, in preserving peace.

The fundamental question in the principal case was what summary relief could the United States extend to its officer, when a particular State not only failed of its duty, but also sought to subject to a criminal prosecution that officer who acted in the emergency as an officer, and, as he believed, in obedience to his instructions.

JOHN B. UHLE.